INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Presentation of petition for appeal	1
Opinions below	2
Jurisdiction	3
Question presented	4
Statutes and constitutional provisions involved	5
The statutes of Virginia involved	5
The Constitutional Provisions involved	6
The statutes of the United States involved	7
Statement	7
The question presented is substantial	9
Conclusion	15
Appendix "A-1"—Letter dated December 12, 1951 from M. B. Watts to Tazewell Taylor, Jr.	16
Appendix "A-2"—Affidavit of John W. Oast, Jr.	17
Appendix "A-3"—Opinion of the Corporation Commission of Virginia	19
Appendix No. 1 to Appendix "A-3"—Opinion of Christopher B. Garnett, Assistant Attorney General of Virginia	31
Dissenting opinion of Catterall, Chairman	42
Appendix "A-4"—Opinion of the Supreme Court of Appeals of Virginia	64
Appendix "A-5"—Order of the Corporation Commission of January 3, 1952	82

Table of Cases Cited

American Barge Line Co. v. *Koontz*, 68 S.E. 56	10
California State Auto Assn. Inter-Insurance Bureau v. *Maloney, Ins. Commr.*, 341 U.S. 105	4
Cities Service Gas Co. v. *Peerless Oil & Gas Co., et al.*, 340 U.S. 179	4
Dean Milk Co. v. *City of Madison, Wis., et al.*, 340 U.S. 349	4
Gibbons v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23	13

Page

Harmon v. *City of Chicago*, 147 U.S. 396 14
Hughes v. *Fetter, et al.*, 341 U.S. 609 4
Niemotko v. *State of Maryland*, 340 U.S. 268 4
Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69 4
Western Maryland Ry. Co. v. *Rogan*, 340 U.S. 520 ... 4

STATUTES CITED

Constitution of the United States:

Article I, Sec. 8, paragraphs 1, 2 & 3 6
Article I, Sec. 10, paragraph 3 7

United States Code:

Title 28:

Section 1257(2) 3
Section 2101(c) 3

Title 46:

Chapter 12 7

Virginia Code of 1950:

Section 58-570 5
Section 58-575 5
Section 58-576 6
Section 58-577 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 671

BALTIMORE STEAM PACKET COMPANY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Appeals of Virginia entered in the above entitled cause on December 3, 1951.

Presentation of Petition for Appeal

In making preparation for the presentation of application for the allowance of an appeal in compliance with Rule 36, paragraph 1 of the revised rules of the Supreme Court of the United States, this petitioner, by counsel, com-

municated with the Clerk of the Supreme Court of Appeals of Virginia with a view to presenting the within application to the Chief Justice of said last mentioned Court and was advised by said Clerk by letter dated December 12, 1951 that "Our Chief Justice usually declines to grant the appeal and refers the matter to the United States Justice". Copy of said letter is hereto attached, made a part hereof and marked Appendix "A-1."

The foregoing policy was on the 28th day of December, 1951, confirmed by Chief Justice Edward W. Hudgins of the Supreme Court of Appeals of Virginia in a telephone conversation had with him by John W. Oast, Jr., Esq., Counsel for Norfolk, Baltimore and Carolina Line, Incorporated, as will appear from affidavit of Mr. Oast which is hereto attached, made a part hereof and marked Appendix "A-2."

The foregoing explanation is presented in order to justify the adoption of the alternative course afforded by Rule 36, paragraph 1, *supra,* in making this application for the allowance of an appeal to one of the Justices of the Supreme Court of the United States.

Opinions Below

The opinions of the Corporation Commission of Virginia rendered herein in the above entitled proceeding (designated in the records of said Commission as "Case No. 10163—application of Baltimore Steam Packet Company"); and the opinion of the Supreme Court of Appeals of Virginia rendered in the above proceeding entitled "*Commonwealth of Virginia* v. *Baltimore Steam Packet Company,* No. 3888," and the order of the Corporation Commission of Virginia entered on January 3, 1952, in Case No. 10163, are hereto attached and marked respectively Appendix "A-3", Appendix "A-4" and Appendix "A-5".

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia is a final judgment and was entered on December 3, 1951. A petition for appeal is herewith presented to the Supreme Court of the United States, to-wit, on February 14th, 1952. The jurisdiction of the Supreme Court of the United States for a review of the decision of the Supreme Court of Appeals of Virginia by direct appeal is conferred by Title 28, United States Code, Annotated, Sections 1257 (2) and 2101 (c). The following statutes and decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Appeals of Virginia on direct appeal in this case:

(a) Title 28, United States Code, Section 1257 (2) reads as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the *ground of its being repugnant* to the Constitution, treaties *or laws* of the United States, and *the decision is in favor of its validity.*" (Italics supplied.)

Title 28, United States Code, Section 2101 (c) reads as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within *ninety days* after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." (Italics supplied.)

(b) The jurisdiction of the Supreme Court of the United States to review the above judgment on this direct appeal pursuant to the Statutes (United States Code, Section 1257

(2) and United States Code, Section 2101 (c) *supra*) is clearly sustained by its decisions, as the question here presented is constitutional.

Richfield Oil Corporation v. *State Board of Equalization*, 329 U. S. 69;

Cities Service Gas Co. v. *Peerless Oil & Gas Co., et al.*, 340 U. S. 179;

Dean Milk Co. v. *City of Madison, Wis., et al.*, 340 U. S. 349;

Niemotko v. *State of Maryland*, 340 U. S. 268;

Western Maryland Railway Co. v. *Rogan*, 340 U. S. 520;

California State Auto Ass'n Inter-Insurance Bureau v. *Maloney, Ins. Comm'r.*, 341 U. S. 105;

Hughes v. *Fetter, et al.*, 341 U. S. 609.

Question Presented

Whether the annual license tax sought to be exacted from the appellant herein for the privilege of doing business in Virginia, pursuant to Virginia Code, 1950, § 58-575, is an excise tax and not a property tax and, therefore, is unconstitutional, it being violative of the Constitution of the United States, Article I, Section 8, Paragraphs 1, 2 and 3, and Acts of Congress passed pursuant thereto, and Article I, Section 10, Paragraph 3 of said Constitution, and Acts of Congress passed pursuant thereto, and is consequently null, void and of no effect, in that said Virginia Statute imposes a burden upon Interstate Commerce carried on by the vessels of the Baltimore Steam Packet Company as common carriers under the licenses and enrollments issued pursuant to the Statutes of the United States in such cases made and provided.

Statutes and Constitutional Provisions Involved

The Statutes of Virginia Involved

The Statutes of Virginia involved are Virginia Code, 1950, §§ 58-570, 58-575, 58-576 and 58-577, reading as follows:

"§ 58-570. Annual report.—Each and every corporation which operates steamships, steamboats or other floating property for the transportation of passengers or freight shall report annually, on or before the first day of May, to the Commission, all of its real and personal property of every description in this State belonging to it as of the beginning of the first day of January preceding, showing particularly in what city, town and school district the property is located and classifying the same under the following heads:

"(1) All steamships, steamboats and other floating property, their machinery and equipments;

"(2) All wharves, sheds, offices, stores, docks, machine shops, granaries, elevators and other buildings;

"(3) All real estate and personal property not included in the foregoing classes.

"Each such corporation shall also give in such report:

"(a) The total number of miles operated within and without this State for the year ending December thirty-first next preceding; (b) the gross receipts from operations entirely within this State and if operations are partly within and partly without this State the entire gross receipts from operations for the year ending December thirty-first next preceding; and (c) any and all other information in such manner and in such detail as the Commission shall require. (1928, p. 152; Tax Code, § 221.)"

"§ 58-575. Annual *license* tax.—Every such company for the *privilege* of doing business in this State, *in addition* to the annual registration fee and property tax, shall pay an annual State *license* tax as follows:" (Italics supplied.)

"Such tax shall be equal to one and one-half per centum upon the gross receipts from operation up to and not in excess of five hundred thousand dollars and one and three-fourths per centum upon such receipts in excess of that amount of such companies, and each of them, within this State.

"When such companies are operated partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided that unless otherwise clearly shown such last mentioned receipts shall be deemed to be that proportion of the total receipts from such business which the entire line mileage over which the business is done bears to the mileage operated within this State.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and every year thereafter, until otherwise ordered by law. (1926, p. 955; 1928, p. 154; 1936, p. 534; 1938, p. 412; 1944, p. 110; Tax Code § 222; 1948, p. 925)."

"§ 58-576. Payment of tax.—Such corporation shall pay into the State treasury by the first of October following the taxes assessed against it. (1928, p. 153; Tax Code, § 221.)"

"§ 58-577. Penalty for failure to pay.—Any such corporation failing to pay such taxes into the State treasury within the time herein prescribed shall incur a penalty thereon of five per centum, which shall be added to amount of the taxes. (1928, p. 153; Tax Code, § 221.)"

The Constitutional Provisions Involved

The Constitutional provisions involved are: Article I, Section 8, Paragraphs 1, 2, and 3 of the Constitution of the United States, reading as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts

and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

"To borrow money on the credit of the United States;

"To regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

Article I, Section 10, Paragraph 3 of the Constitution of the United States, reading as follows:

> "No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

The Statutes of the United States Involved

The statutes of the United States involved are:

Title L "Regulation of Vessels in Domestic Commerce" of the revised statutes of the United States; and

United States Code, Title 46, Chapter 12, pertinent portions of which will be seen by reference thereto.

Statement

We here quote the succinct statement of facts here involved, from the opinion of Justice Buchanan of the Supreme Court of Appeals of Virginia:

> "The appellees, steamship companies, herein referred to as Baltimore and Norfolk, applied to the State Corporation Commission for correction of assessments of state taxes made against them in 1950 by the Commission, based on their gross receipts for 1949, under the provisions of Title 58, Chapter 12, Article 7 of the Code. Their contention was that section 58-575, Article 7, under which the tax was levied,

was invalid because it violated the Commerce Clause, Article I, Section 8, clause 3, and the Duty of Tonnage Clause, Article I, Section 10, clause 3, of the Federal Constitution. Railway Express Agency, Inc., filed a brief in this court as *amicus curiae*.

"The points at issue on the two applications were the same. The facts were stipulated and the two cases heard together.

"Baltimore is a Maryland corporation with its principal office in the city of Baltimore. During 1949 it owned and operated three steamships in the transportation of passengers and freight, two operating daily between the city of Baltimore, in Maryland, and the city of Norfolk, in Virginia, and the third between Washington, D. C., and Norfolk. Each vessel made a trip one way on alternate days, and each stopped at Old Point, in Virginia, for the purpose of receiving and discharging passengers and freight.

"Norfolk is a Virginia corporation with its principal office in the city of Norfolk. In 1949 it owned and operated seven motor vessels, a tug, and a barge, in the transportation of freight between the city of Baltimore, Maryland, and Charleston, South Carolina, "via Norfolk and intermediate points for the purpose of receiving and discharging freight." During part of 1949 it operated a line intrastate in Virginia between Norfolk and Richmond, but that was abandoned after a few months of operation.

"During the entire period of this controversy all of these ships were duly enrolled and licensed in conformity with Title 46, Chapter 12, of the United States Code relating to the "Regulation of Vessels in Domestic Commerce," 46 USCA, § 251 ff., and each thereby became a ship and vessel of the United States, entitled to the privileges secured to such ships and vessels by Federal statutes and regulations for enrolling and licensing ships employed in the coasting trade.

"For the tax years 1949 and 1950 both companies were assessed with and have paid, in addition to the annual registration fee, taxes on their floating equip-

ment at Norfolk, land, structures and money on deposit, located in Virginia. Only the tax on money (and intangibles) is payable to the State; that on real estate and tangible personal property is payable to the localities. Code, § 58-574.

"The Commission held that the companies were liable for the tax on receipts from their intrastate business; i. e., "on business beginning and ending within this State," amounting to $34.31 in the case of Baltimore and $104.86 in the case of Norfolk. No cross-error was assigned to that ruling, and its correctness is not in issue on this appeal. But a majority of the Commission, Commissioner Catterall dissenting, held that the tax on receipts earned in this State on business "passing through, into or out of this State," was invalid, and the assessments were accordingly reduced, being a reduction of $18,981.20 on Baltimore's assessment and $2,365.59 on the assessment against Norfolk. From the latter ruling the Commonwealth appeals. * * *"

The Question Presented Is Substantial

It is submitted that the importance of the question herein presented is beyond dispute. The Virginia Section 58-575, supra, was ruled unconstitutional by the Assistant Attorney-General of Virginia, Christopher B. Garnett, in 1915. His opinion is attached as an exhibit to Appendix "A-3", supra. It was not until 1949 when the State Corporation Commission of Virginia, for the first time after 1915, made an assessment under that Section, that such assessment was ruled invalid by a majority of that Commission, per the opinion of Commissioner King, post. The importance of the question is somewhat emphasized by the length of the opinion of the Supreme Court of Appeals of Virginia, post. The importance of this question is demonstrated by the decision of the Supreme Court of Appeals of West Virginia, in the case of *American Barge Line Co.* v. *Koontz*,

68 S. E. 56, decided on December 20, 1951, which will be observed is the reverse of the conclusion of the Supreme Court of Appeals of Virginia in the case at bar, and so presents a conflict between the respective Supreme Courts of Appeals of Virginia and West Virginia involving questions of interstate commerce which this Court should resolve.

In the case of the *American Barge Line Co.* v. *Koontz, supra,* the Supreme Court of Appeals of West Virginia said:

> "The crucial and dispositive question is whether the statute here considered, as applied to gross income from interstate transportation, violates the commerce clause of the Constitution of the United States, Article I, Section 8. The navigable waterways of this country are free. No one is entitled to exclusive right to use a waterway for transportation purposes by virtue of a license issued by a state. *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23. It will be noted that Code, 11-12A, as amended, explicitly taxes the privilege of transporting passengers and freight by steamboat, steamship, or other floating property. However disguised, undoubtedly the statute authorizes a tax on a percentage of gross income derived by the plaintiffs from purely interstate business transacted in part in this state and in other states. The conclusion is inescapable that this statute, insofar as it attempts to tax gross income from interstate commerce on an apportionment basis, unreasonably burdens interstate commerce. That portion of the statute authorizing such tax even on the apportionment basis, as disclosed by this record, is contrary to the provisions of Article I, Section 8 of the Constitution of the United States. *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227. See *Joseph* v. *Carter & Weeks Co.,* 330 U. S. 422, 67 S. Ct. 815, 91 L. Ed. 993; *Spector Motor Service* v. *O'Connor,* 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; *Norton Co.* v. *Department of Rev.,* 340

U. S. 534, 71 S. Ct. 377, 95 L. Ed. 517; *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 55 S. Ct. 477, 79 L. Ed. 934; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295; *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217, 28 S. Ct. 68, 52 L. Ed. 1031; *Philadelphia S. M. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200; *Moran* v. *New Orleans*, 112 U. S. 69, 5 S. Ct. 38, 28 L. Ed. 653."

Under Article I, Section 8, Paragraphs 1, 2 and 3 of the Constitution of the United States, Congress is given power, among other subjects, to regulate commerce among the several States. Transportation has uniformly been held to be commerce and the authority thereover is plenary and its exercise exclusively vested in Congress.

The genesis of the Constitution is largely attributable to the controversies arising among the several States under the Confederation resulting from the placing of embargoes by one State upon the products of another. This rivalry became so acute, especially as between Connecticut, New York and New Jersey on the one hand and Maryland and Virginia on the other, that at a conference held at Mount Vernon in 1785, it was determined to call a convention of the several States to be held at Annapolis in 1786 to provide a remedy. These preliminary conferences resulted in the convening of the convention of 1787 at Philadelphia which drafted the Constitution which was afterwards ratified by the several States. Familiarity with this historical background justifies the conclusion that the regulation of commerce was the motivating reason leading to the final adoption of the Constitution.

In the absence of good roads and railroads, the chief means of intercourse between the several States was by water, and Congress, by virtue of its constitutional authority and obligation, soon passed the necessary legisla-

tion looking to the exclusive regulation of waterborne traffic by the adoption of appropriate legislation looking to the licensing and enrollment of vessels engaged in the coastwise trade. This legislation resulted in the provisions found in the revised statutes of the United States, Title L "Regulation of Vessels in Domestic Commerce" and now set out at length in United States Code, Title 46, Chapter 12, pursuant to which the Consolidated Certificates of Enrollment and License were issued to each of said steamships belonging to the petitioner, Baltimore Steam Packet Company. As a result of said enrollment and licensing, each of said steamships became and is a ship and vessel of the United States and as such entitled to the privileges secured to such ships and vessels by the regulations and Acts of Congress aforesaid for enrolling and licensing ships to be employed in the coasting trade.

It is earnestly asserted that the steamships in question, having been duly enrolled and licensed, they and their owner and operator, Baltimore Steam Packet Company, are immune from the imposition of any condition or the collection of any license tax by the State of Virginia or any other taxing power other than the United States for exercising the privilege granted pursuant to the Consolidated Certificates of Enrollment and License held by them.

Virgina Code, 1950, § 58-575, provides an annual license tax and that "Every such company for the *privilege* of doing business in this State, in addition to the annual registration fee and property tax, shall pay an annual State license tax as follows:" (Italics supplied.) There follows the basis of assessment, and a provision for apportionment of receipts when operating partly within and partly without the State. It is contended and the position is supported by ample authority hereinafter referred to, that the imposition of a condition or a tax upon an enrolled

vessel or its owner or operator is unconstitutional, even though the operation of the vessel is confined to navigable waters lying entirely within the taxing State, if such waters connect with others susceptible of use in interstate commerce.

This is established by *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23.—Opinion by Chief Justice Marshall.

> Headnote.—"The acts of the Legislature of the State of New York, granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the Constitution of the United States which authorized Congress to regulate commerce, so far as the said acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam."

Pages 211 to 215, both inclusive, discuss at length the privileges enjoyed by a vessel duly licensed in the coasting trade.

Final Decree, pages 239, 240, provides as follows:

> "Decree.—This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and Correction of Errors of the State of New York, and was argued by counsel. On consideration whereof, this Court is of opinion that the several licenses to the steamboats, the Stoudinger and the Bellona, to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery for the State of New York, which were granted under an act of Congress, passed in pursuance of the Constitution of the United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise,

for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding; and that so much of the several laws of the State of New York, as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New York, by means of fire or steam, is repugnant to the said constitution, and void. This Court is therefore of opinion, that the decree of the Court of New York for the Trial of Impeachments and the Correction of Errors, affirming the decree of the Chancellor of that State, which perpetually enjoins the said Thomas Gibbons, the appellant, from navigating the waters of the State of New York with the steamboats the Stoudinger and the Bellona, by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled. And this Court doth further direct, order and decree, that the bill of the said Aaron Ogden be dismissed, and the same is hereby dismissed accordingly."

In dealing with a situation very similar to that at bar, Mr. Justice Field, in *Harmon* v. *City of Chicago*, 147 U. S. 396, answers the contention of the Commonwealth of Virginia, as made below to the effect that Section 58-575 of the Virginia Code, did not require a license:

"In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No State can interfere with it, or put obstructions upon it, without coming in conflict with the su-

preme authority of Congress. The requirement that every steam tug, barge, or tow boat, towing vessels or craft for hire in the Chicago river or its branches shall have a license from the city of Chicago, is equivalent to declaring such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign."

Conclusion

It is submitted that the decision of the Supreme Court of Appeals of Virginia fails to recognize the constitutional prohibition of the United States Constitution, Article I, Section 8, Paragraph 3, which preserves the waters of the United States for the free use by the vessels of the United States. We believe that the question presented by this appeal is substantial and that it is of public importance.

Respectfully submitted,

TAZEWELL TAYLOR, JR.,
Attorney for Baltimore Steam Packet Company, Appellant.

Norfolk, Virginia, February 13, 1952.

APPENDIX "A-1"

SUPREME COURT OF APPEALS OF VIRGINIA

Richmond 10

December 12, 1951

Tazewell Taylor, Jr., Esq.
Attorney at Law
509 Citizens Bank Building
Norfolk 10, Virginia

Dear Mr. Taylor:

I have yours of the 10th in regard to a proposed appeal to the Supreme Court of the United States of the cases of *Commonwealth* v. *Norfolk, Baltimore and Carolina Line, Inc.*, Record No. 3889, and *Commonwealth* v. *Baltimore Steam Packet Company*, Record No. 3888.

You refer to taking an appeal. In such cases the appeal is allowed either by one of the Justices of the Supreme Court of the United States or by the Chief Justice of this State. Our Chief Justice usually declines to grant the appeal and refers the matter to the United States Justice. If the appeal is granted by the United States Justice, he fixes the bond. If it is granted by our Chief Justice, he fixes the bond and, without actually knowing, I imagine it would be $500.00 in each case. I do not have any forms for such bonds as they are usually prepared in accordance with the requirements of the rules of the Supreme Court of the United States. There are a considerable number of papers to be prepared which must be in accordance with the United States Supreme Court rules. I think you had better investigate this matter if you are not familiar with it.

Most of the cases taken from this court to the Supreme Court of the United States are by *certiorari*, which does not involve the preparation of so many papers.

Yours very truly,

/s/ M. B. Watts,
Clerk.

MBW/r

APPENDIX "A-2"

STATE OF VIRGINIA,
City of Norfolk, to-wit:

This day, John W. Oast, Jr., personally appeared before the undersigned, Elizabeth G. Morris, a Notary Public in and for the City, in the State aforesaid, and after being duly sworn deposed and said:

That he is a member of the bar of the Supreme Court of Appeals of Virginia and of the Supreme Court of the United States, and is counsel for the Norfolk, Baltimore and Carolina Line, Incorporated, the petitioner herein; that petitioner's case which was case No. 10168 before the Corporation Commission of Virginia was by him presented to that Commission in close association and co-operation with counsel for the Baltimore Steam Packet Company whose like application for review and correction of the assessment of the State franchise tax was pending before the said Commission as case No. 10163; that thereafter the deponent, as counsel for the petitioner herein, has co-operated closely with the counsel for the Baltimore Steam Packet Company in the above proceedings through the appeal of the Commonwealth of Virginia from that Commission to the Supreme Court of Appeals of Virginia and after the reversal of the orders of said Commission in both of the above cases which were argued together as companion cases before the Supreme Court of Appeals of Virginia has continued to co-operate with counsel for the Baltimore Steam Packet Company incident to the preparation of this appeal; that deponent considered the matter of submitting his client's petition for appeal to the Chief Justice of the Supreme Court of Appeals of Virginia, and incident thereto Mr. Tazewell Taylor, Jr., counsel for the Baltimore Steam Packet Company wrote a letter to the Clerk of the Supreme Court of Appeals of Virginia, who, under date of December 12, 1951, advised Mr. Taylor, as set forth in a copy of said letter hereto attached as Appendix "A-1" hereof; that when Mr. Taylor showed same to deponent, deponent telephoned Chief Justice Edward W.

Hudgins of said Court, at his home in Chase City, Virginia, on December 28, 1951, and inquired if it was a matter of policy of his Court that he would not consider petitions for appeal to the Supreme Court of the United States from his Court involving constitutional questions; he stated that it is his opinion that such petitions should be submitted to a Justice of the Supreme Court of the United States as it is the policy of his Court not to consider such petitions and that if presented to him he would decline to consider same.

JOHN W. OAST, JR.,
Deponent.

Subscribed and sworn to before me this 13th day of February, 1952. In witness whereof, I hereunto affix my hand and notarial seal.

ELIZABETH G. MORRIS,
[SEAL.] *Notary Public.*
My commission expires June 8, 1953.

APPENDIX "A-3"

COMMONWEALTH OF VIRGINIA

Before the State Corporation Commission of Virginia
at Richmond

Case No. 10163

COMMONWEALTH OF VIRGINIA, Appellant,

v.

BALTIMORE STEAM PACKET COMPANY, Appellee.

OPINION OF THE COMMISSION

March 21, 1951

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

Richmond, Virginia

Case No. 10163

COMMONWEALTH OF VIRGINIA, Appellant,

vs.

BALTIMORE STEAM PACKET COMPANY, Appellee.

Appearances:

Tazewell Taylor, Counsel for Applicant; Henry T. Wickham, Assistant Attorney General; Norman S. Elliott, Counsel for the Commission.

Opinion:

King, Commissioner.

This is an application by Baltimore Steam Packet Company for review and correction of an assessment of State license taxes for the year 1950 based upon its gross receipts from business transacted in Virginia for the year

ended December 31, 1949. The case comes to us on a stipulation of facts and on oral testimony introduced by the applicant. From these sources and from the official records of this Commission the facts will be summarized below.

The applicant, a Maryland Corporation organized pursuant to an act of the General Assembly of Maryland passed at the December Session, 1839, has its principal office in Baltimore. During the entire year 1949, and continuously since that time, the applicant owned and operated three steamships (the S. S. City of Richmond, the S. S. City of Norfolk, and the S. S. District of Columbia), all of which were and are engaged in the transportation of passengers and freight. Two of these ships operate daily between Baltimore, Maryland, and Norfolk, Virginia, leaving these termini on alternate days. The other ship operates between Washington, D. C. and Norfolk, Virginia, leaving these termini on alternate days. All three said steamships stop at Old Point Comfort, Virginia, for the purpose of receiving and discharging passengers and freight.

During the entire period covered by this controversy, the three aforementioned steamships were duly enrolled and licensed in conformity with Title 46, Chapter 12, of the United States Code, pertaining to the "Regulation of Vessels in Domestic Commerce". As a result of said enrollment and licensing, each steamship became and is a ship and vessel of the United States and as such is entitled to the privilege secured to such ships and vessels by the various Federal statutes and regulations for enrolling and licensing ships to be employed in the coasting trade.

For the tax years 1949 and 1950, in addition to the annual registration fee, the applicant has been assessed on floating equipment, structures, land and money on deposit, all of which property is admitted to be located in Virginia and with respect to which no question has been raised here. In addition to those taxes, the applicant was assessed with a tax on gross receipts from business done entirely in Virginia for the years 1949 and 1950. The 1949 tax, in the amount of $34.98, has been paid and is not here in controversy, and a similar gross receipts tax

in respect of business beginning and ending in Virginia has been paid by the applicant every year since at least 1915. The applicant is contesting the assessment of the similar tax for 1950, in the amount of $34.41 based on gross receipts from business beginning and ending in Virginia in the amount of $2,287.34 during 1949. That tax was assessed pursuant to Section 58-575 of the Code of Virginia (1950). A penalty of 5% of that tax has also been assessed against the applicant pursuant to the provisions of Section 58-577 of the Code because of its failure to pay the tax by October 1, 1950. The validity of these assessments represents the first issue in the case.

In addition to the foregoing tax assessments, a gross receipts tax for the year 1950 has been assessed against the applicant under Section 58-575 of the Code with respect to its gross receipts from its interstate business during 1949. This is the principal issue in the case. For the tax year 1950, the assessment was in the amount of $18,981.20 and, since that tax was not paid on or before October 1, 1950, a penalty of 5% has been added to the assessment. By bringing this proceeding, the applicant is here contesting the validity of the assessment of the gross receipts tax under Section 58-575 on its interstate business and the assessment of the penalty under Section 58-577. The parties have stipulated that "the amount of the tax set forth above has been properly computed in accordance with the provisions of Section 58-575 of the Code of Virginia".

Section 58-575 levies on every corporation which operates steamships, steamboats or other floating property for the transportation of passengers or freight "for the privilege of doing business in this State, in addition to the annual registration fee and property tax * * * an annual State license tax" measured by a percentage of gross receipts from operations. We do not think the application and validity of this tax is subject to serious question in so far as it applies to the gross receipts from intrastate business.

The tax, based on gross receipts from the intrastate business, is not a charge for the use of the navigable waters of the United States. It is a charge for the privi-

lege of doing business in Virginia in a corporate capacity, and the applicant could avoid the tax if it were willing to forego the advantage of doing business in that form. Since the interstate commerce is not involved, the only question is whether the tax interferes with the Federal license granted to the applicant to operate its vessels in the navigable waters of the United States. We hold that this aspect of the case is governed by the case of *New York ex rel. Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549 (1915), and on the authority of that case we hold the tax of $34.41, together with the 5% penalty, validly imposed.

The next question concerns the validity of the assessment measured by the gross receipts of the applicant from its business in interstate commerce. The Virginia portion of the gross receipts of the applicant from its interstate business, constituting the base of the tax assessment, was determined by applying the following language of Section 58-575:

> "When such companies are operated partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided that unless otherwise clearly shown such last mentioned receipts shall be deemed to be that proportion of the total receipts from such business which the entire line mileage over which the business is done bears to the mileage operated within this State."

As above indicated, the parties have stipulated that the amount of the assessment has been properly computed pursuant to the quoted statutory language. We are not bound by that stipulation in so far as it is a conclusion of law. "We are asked to construe the legal effect of the facts stipulated, not a stipulated conclusion of law." *Central National Bank* v. *First and Merchants National Bank*, 171 Va. 289, 314 (1938); see also 50 Am. Jur. 607 (1944). In any event, it appears obvious from the records of this

Commission that the gross receipts from the applicant's interstate business, used as the tax base, were certainly not computed in literal compliance with the statutory provision.

No proof has been offered to show that the gross receipts earned in Virginia from the applicant's interstate business are different from that proportion of total receipts "deemed to be" the Virginia receipts by the statute in the absence of such proof. The assessment was based on less than 100% of total receipts, but it will be noted that the statute provides for an apportionment of total receipts by applying a fraction the numerator of which is total mileage and the denominator of which is Virginia mileage. Since the total mileage exceeds the Virginia mileage, the statutory apportionment factor is more than 100%, and the statute, if read literally, would require the applicant to pay a tax based on more than 100% of its gross receipts from all sources, including gross receipts from outside Virginia.

Of course it is possible that the difficulty we find with the statutory language is the result of a mistake in drafting. It was assumed to be a mistake by the then Assistant Attorney General of Virginia, Christopher B. Garnett, when he filed an opinion dated September 28, 1915, with this Commission, relating to the application of the gross receipts tax on steamship companies, for he said that the statute "evidently transposes the numerator and denominator".

Thus, the statutory deficiency was clearly pointed out in that official opinion of the Assistant Attorney General more than 35 years ago, but the particular language in question has remained unchanged.

In view of this history, we do not feel that we are free to rewrite the statute to make it read exactly opposite to the way it does read. Moreover, the statutory apportionment formula is particularly set forth and there is not any justification, in the absence of proof to rebut the statutory presumption, for determining gross receipts subject to tax in any manner different from the method provided by the statute. Although there is authority that an unapportioned tax need not fall in its entirety if the tax, as as-

sessed, is "fairly apportioned" to the "business done within the State", see *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948) such an approach does not represent the law of Virginia. The Supreme Court of Appeals has, in *Commonwealth* v. *P. Lorillard, Inc.*, 129 Va. 74, 82 (1921) set forth the Virginia rule as follows:

> "* * * Taxes can only be assessed, levied and collected in the manner prescribed by express statutory authority. Tax assessors have no power to make an assessment except in the manner prescribed by law, and if the statute prescribes a method of assessment which is invalid, the assessor has not power or authority to adopt a method of his own which would have been legal if it had been prescribed by the legislature."

We are not unmindful that the same statutory defect, in so far as the apportionment formula is concerned, appears also in Section 58-547 of the Code relating to the license tax on express companies, and we have consistently ruled that the gross receipts of such companies from operations within Virginia are subject to tax even though those operations are in interstate commerce. There is, however, a material difference in the two cases. To some extent before 1942, and in any event after 1942, the Virginia proportion of the gross receipts from the interstate business of express companies has been "clearly shown" to be different from the amount arrived at by applying the statutory apportionment formula. This is indicated by a memorandum to the Commission dated December 14, 1942, signed by Mr. J. C. Masten, First Assistant Assessor, and by a memorandum dated December 10, 1942, prepared by Mr. H. S. Marx, Vice President and General Counsel of the Railway Express Agency, which former memorandum is initialed by all the then members of this Commission.

The clear showing required by the statute has been made by the express companies and agreed to by the Commission. In the case of steamship companies there has not

been any showing at all to rebut the statutory presumption.

As we shall see later, the Commission has not made any tax assessments on the interstate gross receipts of steamship companies, at least since 1915, on the basis now urged by the Commonwealth or on any other basis, so the assessment may not be supported by any previous administrative interpretation of the statute. Indeed, quite to the contrary, the administrative interpretation, as we shall point out below, supports the opposite view.

We conclude that the assessment as actually made was not made in accordance with the terms of the statute and that there is not any justification for the assessment as made. We also conclude that had the assessment been made in accordance with the statute, it clearly would be invalid since the statute does not provide for a proper apportionment. Accordingly, the statute, since it would operate to tax gross receipts from business operations outside the State, is in conflict with the 14th Amendment to the Constitution of the United States. The tax would be even more objectionable than a tax on unapportioned gross receipts, and as to the latter, Justice Frankfurter has said, "The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power ever since *Fargo* v. *Michigan*, 121 U. S. 230, and *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326." *Freeman* v. *Hewit*, 329 U. S. 249, 257, (1946).

We could rest our decision on this ground alone, but we also reach the same conclusion by other considerations of perhaps a less technical nature.

The Assistant Attorney General of Virginia rendered an opinion dated September 28, 1915, in connection with a proceeding brought by the applicant presently before us and five other steamship companies, all of which were engaged primarily in interstate transportation of passengers and freight. That proceeding contested the constitutionality of Sections 30 and 31 of the Tax Bill, as amended by the Acts of 1915, Chapter 141, in so far as those sections imposed a tax upon the gross receipts of those steamship

companies. The applicable statutory language in the present Section 58-575 is the same as the statutory language considered in 1915.

In a long and well-considered opinion, the Assistant Attorney General concluded that he was reluctantly "forced to the conclusion that Sections 30 and 31 of the Tax Bill as amended by the Acts of 1915, Chapter 141, Page 205 are unconstitutional." That conclusion was based upon the fact that the gross receipts tax was not in lieu of a property tax and therefore could not be supported because it constituted a direct burden on the commerce. It was recognized that the State could impose a tax upon the intangible property, including the going concern value, of the interstate business, but it was concluded that the property taxes levied by Virginia on steamship companies had fully usurped that field. "As the scheme provides for both taxation on property and a license or occupation tax, it can hardly be claimed that the license tax can be justified on the ground of being a commutation."

We do not feel that it is necessary to re-examine the authorities on which the 1915 opinion was based. The Commonwealth does not seriously argue that the 1915 opinion was wrong but rather that more recent constitutional opinions of the Supreme Court of the United States would result in a different conclusion if the matter were reconsidered today. We do not believe, however, that the matter is as simple as that. The interpretation of our statutes—the Virginia Statute here in question—should not be subject to change every time a new Justice is appointed to the Supreme Court of the United States. Section 58-575 of the Code, and the similar statutory provisions preceding it, have been interpreted and administered uniformly for more than 35 years, and we do not believe it is our proper function to change that uniform interpretation.

After the Commission received the opinion of the Assistant Attorney General in 1915, a further hearing was held to consider the whole problem. The full Commission decided that the tax was imposed for the privilege of doing business in Virginia and that it could not be inter-

preted to be a tax in lieu of any legitimate property tax. As such, the tax could not be levied against the gross receipts from interstate commerce, even though properly apportioned, because Virginia does not have the right to withhold permission to do business in interstate commerce.

The interpretation of the statute by the Commission, as indicated above, is confirmed by a letter dated August 24, 1916, from D. Lawrence Groner, then Counsel for the applicant now before us. That letter, speaking of the 1916 tax return, says that "We have not included the earnings on interstate business because of the decision of the Commission on that subject last year." Again, in a letter dated July 6, 1916, received from the President of the Clyde Steamship Company, it is stated: "You will note we have not filled out the statement of receipts as we understand that inasmuch as the Clyde S. S. Co., a Maine Corporation, does not carry on any intrastate business in Virginia it cannot be taxed for the privilege of doing business in Virginia and is not required to make any return of receipts from any interstate business * * *."

It is apparent from the foregoing that the Commission decided in 1915 that it would tax the intrastate gross receipts of steamship companies but that it would not tax the interstate gross receipts of these companies. The steamship companies obviously acquiesced in this administrative policy for they were taxed on that basis from 1915 until 1950.

The Honorable Robert R. Prentis was Chairman of the Commission when the administrative policy was adopted, as outlined above. When he resigned from the Commission the following year (1916) to accept appointment to the Supreme Court of Appeals, he was succeeded as Chairman of the Commission by the Honorable Christopher B. Garnett who had, in the previous year, given the opinion referred to above on the same problem as that now before us. For that matter, from 1915 through 1950 the taxes on steamship companies were assessed and paid in this manner, and it was not until the Honorable Ralph T. Catterall became a member of the Commission and was placed in charge of taxation that an attempt was made to

change the administrative policy. Every other member of this Commission from 1916 to the present time has supported the administrative policy established by the Commission in 1915.

Under these circumstances we believe that there should be accorded "great weight to the long standing customs and practices which have prevailed and which have not heretofore been challenged", particularly under circumstances where "This long standing practice has been well-known over the years", *City of Richmond* v. *Commonwealth*, 188 Va. 600, 622, 627 (1948). As the Supreme Court of Appeals said in *Atlantic & D. R. Co.* v. *Lyons*, 101 Va. 1, 11 (1902), quoting from *Smith* v. *Bryan, Mayor*, 100 Va. 199 (1902):

> "The practical construction given to a statute by public officials, and acted upon by the people, is not only to be considered, but in cases of doubt will be regarded as decisive. It is allowed the same effect as a course of judicial decision. The Legislature is presumed to be cognizant of such construction, and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction."

The same rule is recognized by the Supreme Court of the United States. In *Provost* v. *United States*, 269 U. S. 443, 458 (1926), Mr. Justice Stone said:

> "* * * the enactment of the Revenue Act of 1918 without material change of the provision in question must, we think, be taken as indicating a purpose to continue in force the existing law as interpreted by the Attorney General * * *."

It is idle to suggest, we think, that perhaps it might have been possible to interpret Section 58-575 as imposing a tax in lieu of property taxes or to interpret the tax as a charge for various local benefits that are furnished steamship companies by the State of Virginia. It is beside the point to say that if the statute were so interpreted it would be a valid exercise of the taxing power of the State. Had

the statute been so interpreted it would not be necessary to search for language in the recent split decisions in the Supreme Court of the United States to support it. The statute would have been valid from its inception. *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217 (1891); *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688 (1895).

We may also agree with the Commonwealth that Virginia may levy a tax analogous to the one before us if the tax were made to apply to a proper subject of taxation of this kind. Whether it would be wise to impose such a tax is, of course, for the General Assembly to determine but we may note in passing that in 1915, when the gross receipts tax on steamship companies first came before the Commission, there were some twenty-five steamship companies operating in Virginia and today there are only two. Economic attrition has been severe even in the absence of an applicable gross receipts tax.

We hold, then, that Section 58-575 means what it says. The tax is levied on the privilege of doing business in Virginia and on that alone. It is not levied in lieu of property taxes and it is not a charge for incidental local benefits. *Nashville, etc. Railway* v. *Browning*, 310 U. S. 362, 369 (1940). It is a charge on the privilege of carrying on the business, and where that business is interstate commerce the tax cannot be supported. Unlike the business involved in *Interstate Oil Pipe Line Company* v. *Stone*, 337 U. S. 662 (1949), the business of the applicant is carried on, in part, outside of this State. A tax on gross receipts for the privilege of engaging in that business must fall. *Memphis Natural Gas Company* v. *Stone*, 335 U. S. 80 (1948).

For the reasons stated herein, the Commission entered the order of January 15, 1951 deeming it to be just and right under all the circumstances of this case.

Hooker, Commissioner, concurs.

Appendix

1. Opinion of Christopher B. Garnett, Assistant Attorney General of Virginia, dated September 28, 1915.

2. Memorandum to the Commission dated December 14, 1942, signed by Mr. J. C. Masten, First Assistant Assessor.

3. Memorandum of Mr. H. S. Marx, Vice President and General Counsel of Railway Express Agency, dated December 10, 1942.

4. Annual Report of Baltimore Steam Packet Company to the State Corporation Commission for the year ending June 30, 1915, and correspondence relating thereto as on file of the State Corporation Commission.

5. Letter from Mr. D. Lawrence Groner, Counsel to Robert R. Prentis, Esq., Chairman, State Corporation Commission, dated August 24, 1916.

6. Annual Report of Baltimore Steam Packet Company to the State Corporation Commission for the year ending June 30, 1916 and correspondence relating thereto as on file of the State Corporation Commission.

7. Letter from Mr. H. H. Raymond, President, Clyde Steamship Company to Mr. R. T. Wilson, Clerk of the Commission, dated July 6, 1916.

8. Annual Report of Clyde Steamship Company to the State Corporation Commission for the year ending June 30, 1916, and correspondence relating thereto as on file of the State Corporation Commission.

9. Annual Report of Norfolk and Washington, D. C. Steamboat Company to the State Corporation Commission for the year ending June 30, 1915, and correspondence relating thereto as on file of the State Corporation Commission.

10. Annual Report of Norfolk and Washington, D. C. Steamboat Company to the State Corporation Commission for the year ending June 30, 1916, and correspondence relating thereto as on file of the State Corporation Commission.

APPENDIX NO. 1 TO APPENDIX "A-3"

BEFORE THE STATE CORPORATION COMMISSION OF VIRGINIA

In the matter of the taxation of the Baltimore Steam Packet Company, the Chesapeake Steamship Company, the Maryland, Delaware and Virginia R. R. Co., the Baltimore, Chesapeake and Atlantic R. R. Co., the Old Dominion Steamship Company and the Norfolk and Washington Steamboat Company.

The corporations whose names are set out in the caption above operate within this State steamships or steamboats and other floating property for the transportation of passengers and freight from points within this State to points without the State. A small portion of the business of each one of said corporations consists in purely intrastate business, but by far the greater part of the business of each of said corporations consists in purely interstate business.

Petitions have been filed before the State Corporation Commission contesting the constitutionality of sections 30 and 31 of the Tax Bill, as amended by Acts of 1915, chapter 141, pp. 197, 205 in so far as said sections impose an annual state license tax equal to one and one-eighth percent upon the gross receipts from the operation of such companies within this State.

By the provisions of section 30 of the Tax Bill, as amended, every corporation operating floating property for the transportation of passengers or freight is required, on or before the first day of September, to report to the State Corporation Commission all of its real and personal property of every description in this State belonging to it on the 30th day of June preceding, showing particularly in what city, town and school district the property is located, and classifying the same under the following heads:

(1) All steamships, steamboats and other floating property, their machinery and equipments.
(2) All wharves, sheds, offices, stores, docks, machine shops, granaries, elevators and other buildings.

(3) All real estate and personal property not included in the foregoing classification.

In addition, each corporation is required to report (a) the total number of miles operated within and without the State for the year ending June 30th next preceding; (b) the gross receipts from operations entirely within the State, and if operations are partly within and partly without the State the entire gross receipts from operations for the year ending June 30th next preceding; and (c) any and all other information in such manner and in such detail as the State Corporation Commission may require.

The Corporation Commission is required to assess upon said property the tax imposed by law, and upon the corporations the license tax imposed by law, and a certified copy of the assessment is required to be forwarded to the Auditor of Public Accounts and to the president or other proper officer of each corporation, and each corporation is then required to pay into the treasury of the State, by the 1st day of December following, the tax assessed against it.

By the provisions of said Section 31 of the Tax Bill, as amended, a State tax of sixty-five cents on every hundred dollars on the assessed value of the intangible personal property (other than bonds issued by municipal corporations) owned by corporations operating steamboats is imposed, and local levies are authorized not to exceed thirty cents on every hundred dollars. A State tax on the money of each such company of twenty cents on the hundred dollars is authorized and a State tax on bonds issued by counties, cities or towns, or other political sub-divisions of the State owned by each such company at a rate of thirty-five cents on the hundred dollars is authorized.

A State tax on the real estate and tangible personal property at the rate of ten cents on every hundred dollars is further authorized, and local levies on said real estate and tangible personal property are also authorized.

After providing for the aforesaid taxes, the said section 31 goes on to provide as follows:

"Every such company for the privilege of doing business in this State, in addition to the annual registra-

tion fee, and property tax, shall pay an annual license tax as follows:

"Said tax shall be equal to one and one-eighth per cent upon the gross receipts from the operation of such companies, and each of them, within this State. When such companies are operated partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in Virginia on business passing through, into or out of this State; provided that unless otherwise clearly shown such last-mentioned receipts shall be deemed to be that proportion of the total receipts from such business which the entire mileage over which said business is done bears to the mileage operated within this State."

(It is to be noted that the provision for finding the percentage by taking the proportion of the total receipts from such business which the entire line mileage over which said business is done bears to the mileage operated within this State evidently transposes the numerator and denominator.)

I had occasion to examine a similar question in an opinion submitted by me to the Speaker of the House of Delegates upon a resolution of that honorable body requesting me to report to the House my opinion as to the constitutionality of the franchise tax authorized by the Constitution and statutes of Virginia upon the gross earnings of railroads. In the course of that opinion I examined critically the following cases:

Maine v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 35 L. ed. 994;

Galveston H. & S. A. R. Co. v. *Texas*, 210 U. S. 217, 52 L. ed. 1031;

Meyer v. *Wells Fargo Co.*, 223 U. S. 297, 56 L. ed. 445;

United States v. *Minnesota*, 223 U. S. 335, 56 L. ed. 459.

After the examination of the aforesaid cases, I made the following deductions:

"1. The State may tax a railway corporation engaged in interstate commerce; and, in establishing its scheme of taxation, the State may tax such a corporation's property independently of any value it may have 'as a going concern', and, in addition, may take into account the value of its property as a going concern; or, as stated by Mr. Justice Holmes, it may tax such property, not merely as a congeries of unrelated items, but in its organic relations, taking into account the augmentation of its value from the commerce in which it is engaged.

"2. If the scheme of taxation is a method of ascertaining or commuting this value, and is not an attempt to reach and tax as such receipts from interstate commerce, then the scheme will not be held contrary to the commerce clause of the Federal Constitution.

"3. In the *Maine* case, the Court sustained a scheme of taxation which included (a) local taxation of part of the real estate and fixtures of a railroad, (b) a franchise tax varying from one-quarter of one per cent. to three and one-quarter per cent. on gross receipts from interstate and intrastate commerce earned within the State as a commutation of the value of the property not subject to taxation and also of the value of its property 'as a going concern' not reached by the other taxes thereon.

"4. In the *Texas* case, the Court declared invalid a scheme of taxation which included therein a direct tax of one per cent upon receipts from interstate and intrastate commerce earned within the State, and, in addition, provided for a tax upon the railroad's property as a going concern, thus in effect taking the receipts from interstate commerce into account twice. Examining the brief of counsel for the railroads in the *Texas* case, we find that the property of the railroads had been assessed, equalized and taxed, and that the companies had paid *ad valorem* taxes to the

State, counties, municipalities and school districts, or to quote (p. 165): 'Here the State first taxes the property at the same *ad valorem* rate as other property, real and personal, in the State; proceeding further, it taxes the franchise of the corporation owning the property; it then taxes, under the guise of an occupation tax, the passenger receipts from passenger travel wholly within the State at the rate of one per cent. on the gross receipts of the corporation, thus again taxing the product of the same property that had already paid its full quota of *ad valorem* taxation.'

"5. In the *Oklahoma* case, the Court declared invalid a scheme of taxation which included (a) an *ad valorem* tax upon the *property* and *assets* of the express company (which would include the value of its franchise), and, in addition, included (b) a tax of one per cent. upon gross receipts from interstate and intrastate commerce.

"6. In the *Minnesota* case, the Court upheld the validity of a tax upon an express company of six per cent. upon its receipts from all sources, including both interstate and intrastate commerce, which was in lieu of all taxes, upon the theory that such a tax was a fair commutation of the taxes upon its property as a going concern.

"7. Any system of State taxation of a railroad property will be held invalid which is not a fair commutation of its value as a going concern, upon the ground that any taxation in excess of its value as a going concern is a burden upon its interstate commerce."

In order to reach a correct solution of the question involved in this case, we must ascertain whether the annual State license tax imposed by section 31 of one and one-eighth per cent. upon the gross receipts from the operation of such companies within this State is in addition to the tax upon the property of the corporations, taking into consideration their value as a going concern.

In the case of the taxation of the railroads, it was found that the tax upon property did not include the value of said

property as a part of a going concern; but, when we come to examine the scheme of taxation proposed by sections 30 and 31, we ascertain that the statute as drafted does not exclude from the value of its intangible property the idea that it is to be taxed as the property of a going concern. The scheme of taxation adopted involves, first, State taxation of all of the property, real and personal, located within this State, and local taxation of all such property except money and bonds issued by municipalities; second, in addition to the annual registration fee and property tax aforesaid, each corporation is required to pay an annual license tax equal to one and one-eighth per cent. upon the gross receipts from the operation of such company within this State. It is implied, I presume, that where the line of the company is entirely within the State, the license tax must be upon its entire gross receipts, but when the company's operations are partly within and partly without the State, the gross receipts within the State consist of (a) all receipts on business beginning and ending within the State, and (b) on all receipts earned in Virginia on business passing through, into or out of the State; and in case of receipts earned in Virginia on business passing through, into or out of the State, it is provided that unless otherwise clearly shown such last mentioned receipts shall be deemed to be that proportion of the total receipts from such business which the entire line mileage over which said business is done bears to the mileage operated within this State.

As the scheme provides for both taxation on property and a license or occupation tax, it can hardly be claimed that the license tax can be justified on the ground of being a commutation.

It has been held by the Supreme Court of the United States that a statute laying upon telegraph companies, domestic as well as foreign, a tax for the privilege of carrying on their business graduated in each case upon the amount of property in miles and its value, and exempting such companies from all other taxation, was not unconstitutional where it was found that the burden of the tax was less than the ordinary tax on the same amount of property. *Postal Telegraph and Cable Co.* v. *Adams*, 155

U. S. 688, 39 L. ed. 311. The court justified the tax in that case because it was in lieu of any other tax on property. Mr. Chief Justice Fuller, in delivering the opinion of the court, used the following language:

> "In the case before us the tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of the State legislation. We are of opinion that it was within the power of the State to levy a charge upon this company in the form of a franchise tax, but arrived at with reference to the value of its property within the State and in lieu of all other taxes, and that the exercise of that power by the statute, as expounded by the highest judicial tribunal of the State * * *, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon."

The Court also in said case, at p. 696, used the following language:

> "Doubtless no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or the just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

The method marked out in our State Constitution for taxing railway corporations is saved from unconstitu-

tionality under the commerce clause by the fact that the value of the franchise is specifically excluded from the property tax authorized to be imposed upon such corporations and the franchise tax is a commutation of such value. The Supreme Court of the United States has recognized the right of the State to lay a proportionate tax on the entire property of a corporation engaged in interstate commerce, and whether this tax takes the form of a tax on property or a franchise tax is immaterial. In *Postal Telegraph-Cable Company* v. *Adams, supra,* the court said:

> "It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.
>
> "Doubtless, no state could add to the taxation of property, according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce,

or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

In the same way, the court sustained a franchise tax which was calculated upon the basis of the intangible property as well as the tangible property within the State. *Adams Express Co.* v. *Kentucky*, 166 U. S. 171, 41 L. ed. 960; *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965. Conversely, our own Supreme Court of Appeals has held that, although the statute recites that the tax is in lieu of an *ad valorem* tax on the property of the company located within the State, it is, if it exceeds the amount which could properly be levied under the property tax law, void as a regulation of commerce. *Postal Telegraph-Cable Co.* v. *Richmond*, 99 Va. 102, 37 S. E. 789.

The form of taxation of corporations engaged in interstate commerce which has been adopted in a great many states, and has been approved by the Supreme Court of the United States, is to tax in each State a certain proportion of the whole assets of the company, the proportion being based on a comparison of the business done within the State to the whole business of the corporation. The effect of such a tax is to include within the property of the corporation legally taxable by the State a proportion of all the intangible as well as the tangible assets of the company. Says Mr. Chief Justice Fuller in *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 220, 41 L. ed. 683:

"As to railroad, telegraph, and sleeping car companies engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which

it was put, and all the elements making up aggregate value, and that a proportion of the whole, fairly and properly ascertained, might be taxed by the particular State, without violating any Federal restriction. The valuation was, thus, not confined to the wires, poles, and instruments of the telegraph company, or the roadbed, ties, rails, and spikes of the railroad company, or the cars of the sleeping car company, but included the proportionate part of the value resulting from the combination of the means by which the business was carried on—a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles or railroad over which its cars run in a particular State bears to the whole number of miles traversed by them in that and other States, or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State.

"Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use."

The method of taxation adopted by the Legislature in sections 30 and 31, set out above, as we have already seen, involves, first, the taxation of all the property, tangible

and intangible, of steamboat companies within this State, and, in addition, an annual license tax upon the receipts from business beginning and ending in this State; and, in addition, a proportionate license tax upon business passing through, into or out of the State, said proportion being based upon the ratio of mileage within the State to the entire mileage of the company.

This system of taxation seems to have been clearly disapproved in *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 52 L. ed. 1030, and *Meyer* v. *Wells Fargo Co.*, 223 U. S. 297, 56 L. ed. 445, upon the ground that the excise, privilege or license tax, together with the property tax, amounted to more than the ordinary tax upon the corporation's property within the State as a going concern. In the latter case, after holding that the tax was not a property tax, the court said that as all the property and assets were subject to *ad valorem* taxes, therefore, "this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217, given in *Galveston, H. & S. A. R. Co.*, 210 U. S. 217, 226; *Flint* v. *Stone Tracy Co.*, 220 U. S. 217, 226, and to suppose it intended to reach only the additional value given by its being a part of a going concern to property already taxed in its separate items. There is nothing sufficient to indicate such a limitation, and for the reasons given above, on the authority of *Forgo* v. *Hart*, 193 U. S. 490, 48 L. ed. 761, it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property in the State."

I am, therefore, reluctantly forced to the conclusion that sections 30 and 31 of the Tax Bill, as amended by the Acts of 1915, chapter 141, p. 205, are unconstitutional.

Respectfully submitted,

_____ _____,

Assistant Attorney General of Virginia.

GP.

September 28, 1915.

APPLICATION OF BALTIMORE STEAM PACKET COMPANY

Case No. 10163

For Correction of State Franchise Tax

CATTERALL, *Chairman*, dissenting:

Article 7 of Chapter 12 of Title 58 of the Code of 1950 imposes taxes on steamship companies. The section of that Article here involved reads as follows:

> "§ *58-575. Annual license tax.*—Every such company for the privilege of doing business in this State, in addition to the annual registration fee and property tax, shall pay an annual State license tax as follows:
>
> "Such tax shall be equal to one and one-half per centum upon the gross receipts from operation up to and not in excess of five hundred thousand dollars and one and three-fourths per centum upon such receipts in excess of that amount of such companies, and each of them, within this State.
>
> "When such companies are operated partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided that unless otherwise clearly shown such last mentioned receipts shall be deemed to be that proportion of the total receipts from such business which the entire line mileage over which the business is done bears to the mileage operated within this State.
>
> "The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and every tax year thereafter, until otherwise ordered by law."

The tax complained of was assessed in accordance with the provisions of this section. There is no controversy

over the amount of the tax, and the taxpayer does not contend that the statute does not purport to impose the tax. Its sole contention is that § 58-575 is unconstitutional.

The predecessor of § 58-575 was enacted by the General Assembly in 1915. At that time the Hon. Christopher B. Garnett was assistant attorney general, and he advised the State Corporation Commission that the tax was unconstitutional because in conflict with the commerce clause of the Federal constitution. The following year he became a member of the State Corporation Commission.

For the thirty-five years between 1915 and 1950 the Commission has assessed the tax on "all receipts on business beginning and ending within this State," but has not assessed the tax on "all receipts earned in this State on business passing through, into or out of this State."

Thus, the administrative construction has been that the tax measured by gross receipts earned in this State on business passing through, into or out of this State is unconstitutional. The General Assembly has not acquiesced in this administrative construction. It re-enacted the law in 1948 by Acts of 1948, p. 924, and it re-enacted the law by adopting the Code of 1950. The clause held unconstitutional by the Commission is still in the statute. This amounts to a declaration by the legislature that, in its opinion, the clause is constitutional and should be enforced. The re-enactment of a law previously held unconstitutional cannot be construed as approval of the holding, but must be construed as a directive to re-examine the previous decision and uphold the constitutionality of the law if possible.

In my opinion, the tax is constitutional. It is a tax on going concern value. Going concern value is property, and the value of that property is measured by the gross receipts. It is, therefore, an *ad valorem* property tax.

The worst thing that can be said against the constitutionality of this tax is that the statute calls it an "annual license tax." Calling it a license tax does not make it a license tax any more than calling it a poll tax would make it a poll tax. In *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 65 L. ed. 638, the statute imposed

what it called an "annual license tax," and the Court held that it was a property tax, saying (p. 292):

> "The name by which the tax is described in the statute is, of course, immaterial."

The Court also said (p. 292):

> "The question is one of local law, so that a decision of it by the highest Court of the State would be accepted by us as conclusive."

A license tax is one that has to be paid as a condition precedent to doing something. For example, you are not allowed to drive an automobile on the public highways without first putting license plates on it. The State, if it wanted to, could stop every automobile at the State line and make it buy State license plates before proceeding. *Hendrick* v. *Maryland*, 235 U. S. 610, 59 L. ed. 385; *Kane* v. *New Jersey*, 242 U. S. 160, 61 L. ed. 222. But a state may not stop at its border a vessel licensed by the United States and require it to purchase a state license for the privilege of continuing its voyage. The State may not forbid what the Federal license permits. Thus, in *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653, a state statute authorized the city:

> "To levy, impose and collect a license upon all persons pursuing any trade, profession or calling, and to provide for its collection; and said license shall not be construed to be a tax on property."

The statute authorized any court of competent jurisdiction to enjoin the carrying on of business without a license. In holding that the owner of vessels duly enrolled and licensed under the laws of the United States to engage in the coasting trade could not be required to pay this tax, the Court said (p. 75):

> "The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him, for using his boats in this way, he shall not be permitted to act under and avail himself of the license

granted by the United States but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express."

A vessel enrolled in the coasting trade is entitled to enter any port of the United States whether it is engaged in interstate commerce or solely in intrastate commerce, and any state statute that forbids it to enter any port in the State is void. If, therefore, § 58-575 means that an enrolled vessel cannot enter a state port without a state license, it is void not only as to interstate commerce but also as to intrastate commerce.

Now it is obvious that § 58-575 does not mean that a vessel is required to pay the tax as a condition of navigating or of entering a port. This taxpayer has been paying the tax measured by "all receipts on business beginning and ending in this State" for thirty-five years and has never been issued a license by the State. If the tax is not paid the State will collect it by an ordinary lawsuit. It will not seek to forbid the vessels to operate. §§ 58-635 and 58-642 provide that a motor carrier who fails to pay his road taxes can be forbidden to use the roads. There is no similar provision of law applicable to water carriers.

§ 58-243, concerning licenses generally, provides:

> "Upon the receipt of every application for a license, the commissioner of the revenue, if satisfied of its correctness, shall compute the tax prescribed by law and shall issue a license to the applicant to prosecute the business, employment or profession named in the application, . . ."

Nothing like that is done in the case of steamboats. The State does not issue a license to steamboats or claim the right to do so.

§ 58-239 provides:

> "Whenever a license is specially required by law and whenever the General Assembly shall levy a license tax on any business, employment or profession, it shall

be unlawful without a license to engage in such business, employment or profession."

That section is the first section of Chapter 7 of Title 58 and applies to the licenses provided for by that chapter. It does not apply to steamboats and has never been applied to steamboats. If it should be thought that, broadly interpreted, it could apply to steamboats, the last sentence of § 153 of the Constitution would keep it from applying to steamboats. That sentence says:

> "The provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case."

This rule of interpretation applies to all acts of the legislature as well as to the article of the Constitution in which it is expressed. *A. C. L. R. Co.* v. *Comm.*, 136 Va. 134, 143, 144.

The so-called license tax on steamship lines is not a license tax but an *ad valorem* property tax.

In *Richmond* v. *Commonwealth*, 188 Va. 600, the Court pointed out that the Virginia taxes on public service companies have been developed from the system prescribed for assessing the properties of railroad companies. At page 613 the Court, speaking of a power company, said:

> "Since the existing method of assessing the properties of the appellee company was developed from the system prescribed for assessing the properties of *railroad companies* we will give our attention first to the origin and expansion of the constitutional and statutory provisions relating to the taxation of railroads."

And at page 619, quoting from the opinion of the Commission, the Court said:

> "'A consideration of the constitutional and statutory provisions which govern the assessment of the

properties of public service corporations will reveal that a uniform plan for the assessment and taxation of public service companies has been evolved. . . ."

The Court, in the same case, makes it clear that the franchise taxes levied by the State on public service companies are taxes levied on the *value* of the franchise. A tax levied on property and measured by its value is, of course, not a license tax, but an *ad valorem* property tax.

At page 619, continuing to quote from the Commission's opinion, the Court said:

> "The constitutional and statutory provisions, providing for this dual method of taxing such companies, uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exclude* such franchise value as may be inherent in such property."

In other words, the localities tax the value of the "bare bones" of the property and the State taxes the franchise value or "going concern" value of the same property. This "dual method" does not mean that the same value is taxed twice. It means that two different parts of the whole value of the property are each taxed once. The property of a going concern has two kinds of value: the "bare bones" value of each separate item of inert property and the going concern value of the property as a whole.

At page 623, the Court, quoting from Judge Prentis, said:

> " 'It will be noted that in assessing these properties the Commission is expressly forbidden by the Constitution to include any franchise value in the assessment of the physical properties for taxation.' "

At page 624, the Court, quoting from Judge Epes, said:

> " 'The value of these physical properties . . . is the actual value . . . of the land and other physical properties of the railroad company exclusive of any franchise value, good will, "going concern value," "cost of estab-

lishing the business," or other "intangible" value of the company.' "

The franchise taxes on railroads, power companies, steamship lines and other public utilities follow this pattern. Whether the tax is called a franchise tax or a privilege tax or a license tax is not material. For convenience of reference it has to be given a name to distinguish it from the local taxes on the local property. In its essence it is a tax on the going concern value of the utility's property in Virginia.

As said by the Court in the Richmond tax case, *supra*, these taxes were developed from the system established for the taxation of railroads. That system of taxation was embodied in the Constitution of 1902. The framers of that Constitution, in order to make sure that the Virginia system did not violate the Federal Constitution, copies the Maine system that had been held constitutional by the Supreme Court of the United States in 1891 in *Maine* v. *Grand Trunk Railway*, 142 U. S. 217, 35 L. ed. 994. At page 2671 of the 1902 Constitutional Debates, Mr. Meredith said: "That language is used in the Maine statute, which has received the construction of the Supreme Court in 142nd United States Reports."

The following language of the Virginia constitution was discussed, also at page 2671:

> ". . . from the sum so ascertained there may be deducted a reasonable sum because of any excess of value of the terminal facilities or other similar advantages situated in other States over similar facilities or advantages situated in this State."

Mr. Meredith said: "In treating this we had to be very careful because we knew we had to run the risk of a contest in the United States Courts. We took the Maine statute as far as we could and added to it this provision because the courts have recognized that in ascertaining the gross receipts per mile, the boards must be allowed to take into consideration the extra facilities in other States."

The quoted language now appears in Section 178 of the Constitution and § 58-520 of the Code. The special significance of that language is that it emphasizes the fact that the gross receipts tax is a property tax. The tax is on the going concern value of the property in Virginia, and the value of that property is measured by the gross receipts earned on Virginia mileage. The formula for ascertaining the value of the part of the going concern that lies in Virginia presumes that the value is distributed equally over each mile of line. That presumption can be rebutted by proof that the part of the property in other states is more valuable per mile than the part in Virginia. This provision for weighing property values in other states against property values in Virginia makes it certain that the tax is in fact a tax on property measured by its value. The corresponding provision in the steamship tax law is contained in the proviso in the third paragraph of § 58-575:

> ". . . provided that unless otherwise clearly shown such last mentioned receipts shall be deemed to be that proportion of the total receipts from such business which the entire line mileage over which the business is done bears to the mileage operated within this State."

The localities tax the "bare bones" of the physical property, and the State taxes the "going concern" value, which value is measured by the gross receipts *apportioned* to the Virginia mileage. In its 1941 Annual Report at page 41, the Commission points out that the franchise tax is a tax on going concern value. Judge Ozlin there said:

"FRANCHISE VALUE EXCLUDED

"It must be borne in mind that, in assessing the physical properties of railroads for taxation, the franchise value is excluded. This is so by express constitutional mandate. The franchise is taxed separately by the State, and based upon the gross receipts of the company. This franchise includes the value of the charter or privilege of doing business, that is, the

value of the privilege of serving the particular community being served, or the value of being first in possession of the particular location, the good will of the business already established, the patronage already secured, the value of all existing contracts, and all those values which are usually comprehended in the term, 'going concern value.'

"Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%."

In *Maine* v. *Grand Trunk*, the Court held the tax constitutional and distinguished the case of *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200. Of the Maine tax, the Court said (142 U. S. at p. 229):

"There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

Of the Pennsylvania tax, the Court said:

"That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the State, derived from the transportation of persons and property between different states and to and from foreign countries. Such tax was held without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair them."

The decisive difference between the Maine tax on the railroad and the Pennsylvania tax on the steamship line is that the Maine tax was *apportioned* to the mileage within

the State and the Pennsylvania tax was not. If the tax were *not* so apportioned, more than one State could tax the same property. For example, if 48 States imposed a 2% tax on *total* gross receipts of a transportation company, the taxes would add up to 96% of its gross receipts and it could not operate. But if each State measured its tax by the receipts properly apportioned to that State, all 48 taxes would be based on only 2% of the carrier's total gross receipts.

In *Joseph* v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422, 91 L. ed. 993 (1947) the tax on the gross receipts of the stevedoring company was *not* apportioned, and for that reason it was held unconstitutional. If it had been apportioned it would have been held constitutional.

At page 427, the Court said:

> "This has arisen from long continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the States with interstate commerce and that this rule applies in full force to an unapportioned tax on the gross proceeds from interstate business, where the taxes were not in lieu of *ad valorem* taxes on property.
>
> "We do not think that a tax on gross income from stevedoring, obviously a 'continuation of the transportation,' is a tax apportioned to income derived from activities within the taxing State. The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing State because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself.
>
> "When we come to weigh the burden or interference of this tax on the gross receipts from interstate commerce, the purposes of that portion of the Commerce Clause—the freeing of business from unneighborly regulations that inhibit the intercourse which supplies reciprocal wants by commerce—is a significant factor for consideration. An interpretation of the text to

leave the State free to tax commerce until Congress intervened would have permitted intolerable discriminations. *Nippert* v. *Richmond*, 327 US 416, 90 L. ed. 760, 66 S. Ct. 586, 162 ALR 844, and cases collected in notes 13, 14, 15 and 16. Nevertheless, a proper regard for the authority of the States and their right to require interstate commerce to contribute by taxes to the support of the State governments which make their interstate commerce possible, has led Congress, over a long period, to leave intact the *judicial rulings, referred to above,* that apportioned, nondiscriminatory gross receipt taxes or those fairly levied in lieu of property taxes conformed to the requirements of the Commerce Clause." (Italics added.)

Among the "judicial rulings, referred to above" which the Court says are still in full force and effect, is *Maine* v. *Grand Trunk.* The Court says that *two* kinds of gross receipts taxes are constitutional: (1) "apportioned, non-discriminatory gross receipts taxes," and (2) "those fairly levied in lieu of property taxes." Except for poll taxes, every tax, in final analysis, is either a property tax or an excise tax. 51 Am. Jur., Taxation §§ 24, 81. And every property tax is either a lump-sum tax or an *ad valorem* tax. The Virginia tax under consideration is fairly apportioned and is a property tax on the going concern value of the steamship line. It is the only Virginia tax imposed on the going concern value. The localities are forbidden to tax the going concern value. It is the same kind of tax that was held constitutional in *Maine* v. *Grand Trunk.*

In the stevedoring case, Black dissented without opinion, Douglas and Rutledge thought the tax valid as to interstate commerce but void as to foreign commerce, and Murphy thought the tax valid as to all commerce.

Thus did all nine of the Justices reaffirm the *Grand Trunk* case. The disagreement among them was over whether the stevedoring tax was or was not *apportioned.*

The dissenting Justices said (p. 437):

"No other State could tax the same activity. The tax therefore is in its application nothing more than

a gross receipts tax apportioned to reach only income derived from activities within the taxing State."

The majority said (p. 429):

"The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading."

In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633, (1948) the tax on gross receipts was *unapportioned* and for that reason five of the Justices held it unconstitutional. They also held that if it could be apportioned it was constitutional and remanded the case to the State Court for decision under the State law as to whether it could be apportioned. The dissenting Justices thought the law was constitutional. Thus did all nine Justices again hold that a tax apportioned in accordance with the *Grand Trunk* case was valid.

The Central Greyhound Lines was a motor bus carrier, but the tax in question was not a "road tax." It was not a tax for the privilege of using the highways. It was a tax on all public utilities. It was a tax "equal to two per centum of its gross income . . . upon every utility doing business in this State . . . in addition to any and all other taxes and fees imposed by any other provision of law. . . ."

The following quotation from the Court's opinion shows (1) that the stevedoring case, *Joseph* v. *Carter & W. Stevedoring Co.*, held the tax void because it was *not* apportioned, (2) that an *apportioned* tax is valid, and (3) that apportionment in accordance with the formula in *Maine* v. *Grand Trunk* is constitutional:

"By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.' *Id.* at 253, 91 L. ed. 272, 67 S. Ct. 274. The vice of such a tax is that it lays 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State, a part of every dollar received in such trans-

actions.' *Crew Levick Co.* v. *Pennsylvania*, 245 US 292, 297, 62 L. ed. 295, 299, 38 S. Ct. 126; see *J. D. Adams Mfg. Co.* v. *Storen*, 304 US 307, 311, 82 L. ed. 1365, 1369, 58 S. Ct. 913, 117 ALR 429; *Freeman* v. *Hewit*, 329 US 249, 91 L. ed. 265, 67 S. Ct. 274, *supra*; *Joseph* v. *Carter & W. Stevedoring Co.*, 330 US 422, 91 L. ed. 993, 67 S. Ct. 815.

"However, while the New York courts have construed the statute as levying an unapportioned gross receipts tax on this transaction, the entire tax need not fall. The tax may be 'fairly apportioned' to the 'business done within the State by a fair method of apportionment.' *Western Livestock* v. *Bureau of Revenue*, 303 US 250, 255, 82 L. ed. 823, 827, 58 S. Ct. 546. There is no dispute as to feasibility in apportioning this tax. On the record before us the tax may constitutionally be sustained on the receipts from the transportation apportioned as to the mileage within the State. See *Ratterman* v. *Western U. Teleg. Co.*, 127 US 411, 427, 428, 32 L. ed. 229, 233, 234, 8 S. Ct. 1127, 2 Inters. Com. 59. There is no question as to the fairness of the suggested method of apportionment. Compare *Maine* v. *Grand Trunk R. Co.*, 142 US 217, 35 L. ed. 994, 12 S. Ct. 121, 163, 3 Inters. Com. 807, *supra*, with *New Jersey Bell Teleph. Co.* v. *State Bd. of Taxes & Assessments*, 280 US 338, 74 L. ed. 463, 50 S. Ct. 111; *cf. Wallace* v. *Hines*, 253 US 66, 64 L. ed. 782, 40 S. Ct. 435. Both appellant and appellee have indicated here that, as a matter of construction, the statute under consideration permits such apportionment, but that is a matter for the New York courts to determine.

"The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

In *Central Greyhound Lines*, an apportioned tax measured by gross receipts was upheld on the authority of *Maine* v. *Grand Trunk*, without considering whether the New York tax was a property tax or an excise tax. Some

of the Justices of the Supreme Court, from time to time, have taken the position that because the tax in *Maine* v. *Grand Trunk* was really a property tax that case is not authority for upholding *excise* taxes on gross receipts earned in interstate commerce, but no Justice of the Supreme Court has ever dissented from the view that a tax like the Maine tax is constitutional. All agree that a tax on going concern value measured by apportioned gross receipts is constitutional. And since the Virginia tax on steamship lines is patterned after the Maine tax it is equally constitutional.

The argument over whether the Maine tax was a property tax or an excise tax begins with *Galveston, Harrisburg & San Antonio Railway* v. *Texas*, 210 U. S. 217, 52 L. ed. 1031 (1908). The Maine statute *called* the Maine tax an *excise* tax, but the Court, after analyzing it in a way that brings out the similarities between the Maine tax and the Virginia tax, decided that it was a property tax, and said:

> "The State must be allowed to tax the property, and to tax it at its actual value as a going concern."

The opinion was written by Mr. Justice Holmes, and he analyzed the Maine tax as follows (p. 226):

> "In *Maine* v. *Grand Trunk R. Co., supra*, 'an annual excise tax for the privilege of exercising its franchise' was levied upon everyone operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state, when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and

fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See *Ficklen* v. *Taxing District*, 145 U. S. 1, 23, 36 L. ed. 601, 607, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 697, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *McHenry* v. *Alford*, 168 U. S. 651, 670, 671, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242.

"'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' *Postal Teleg. Cable Co.* v. *Adams, supra.* See *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 438, 439, 39 L. ed. 1043, 1045, 1046, 15 Sup. Ct. Rep. 896. The question is whether this is such a tax. It appears sufficiently perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern."

So far as Virginia is concerned it makes no difference whether the doctrine of the *Grand Trunk* case, as explained by Mr. Justice Holmes, sustains only taxes like the Maine tax or whether it goes further than that. Either way, the Virginia taxes are valid so long as the *Grand Trunk* case is not overruled. The arguments over the scope of the *Grand Trunk* decision are solely concerned with the question of whether it goes *further* than merely to uphold gross receipts taxes on going concern value, and upholds gross

receipts taxes that are excise taxes in fact as well as in name.

In *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 93 L. ed. 1613 (1949) the argument was over whether Justice Holmes's explanation of the *Grand Trunk* case was correct, or whether the scope of the *Grand Trunk* decision went far enough to uphold an excise tax (as opposed to a tax on going concern value) on a pipe line company that did only interstate business.

Rutledge, Black, Douglas and Murphy thought the *Grand Trunk* case covered the pipe line case.

Reed, Vinson, Frankfurter and Jackson thought it did not go that far.

Burton thought the commerce in question was all *intra*-state, and therefore had no occasion to express any views as to the scope of the *Grand Trunk* case.

Justice Rutledge's opinion says (p. 666):

> "The statute is not invalidated by the commerce clause of the Federal Constitution merely because, unlike the statute attacked in *Memphis Natural Gas Co.* v. *Stone* (US) *supra*, it imposes a 'direct' tax on the 'privilege' of engaging in interstate commerce. Any notions to the contrary should not have survived *Maine* v. *Grand Trunk R. Co.*, 142 US 217, 35 L. ed. 994, 12 S. Ct. 121, 163, 3 Inters. Com. 807, which flatly rules the case at bar."

In footnote No. 7, he said:

> "Nothing in the *Grand Trunk* opinion suggests the explanation hazarded by Mr. Justice Holmes in *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 US 217, 226, 52 L. ed. 1031, 1037, 28 S. Ct. 638, that the tax in the *Grand Trunk* case was sustained on the ground that it was imposed in lieu of *ad valorem* taxes."

Justice Reed's opinion, in footnote No. 18, referring to *Central Greyhound Lines* v. *Mealey*, said:

> "This decision followed a prolonged controversy over the taxability of the proceeds of interstate com-

merce. *Maine* v. *Grand Trunk R. Co.*, 142 US 217, 35 L. ed. 994, 12 S. Ct. 121, 163, 3 Inters. Com. 807, has been cited for the same proposition, see e.g., *J. D. Adams Mfg. Co.* v. *Storen*, 304 US 307, 329, 82 L. ed. 1365, 1378, 58 S. Ct. 913, 117 ALR 429, although there is in the report of the case, p. 218, § 2 of the Act there in question, support for Mr. Justice Holmes's treatment of it in *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 US 217, 226, 52 L. ed. 1031, 1037, 28 S. Ct. 638, as a tax in lieu of *ad valorem* taxes."

Thus four of the Justices considered the scope of the *Grand Trunk* case broad enough to uphold an excise tax on the privilege of engaging in interstate commerce, and the four dissenting Justices thought that Justice Holmes's analysis of the *Grand Trunk* case was correct; and that the Maine tax was a tax on property the value of which was measured by gross receipts. The four dissenting Justices reaffirmed their concurrence in *Central Greyhound Lines*, saying (p. 681):

> "All interstate commerce thus has free access to local markets subject only to nondiscriminatory taxes such as the tax on apportioned gross receipts from intrastate mileage as in *Central Greyhound Lines* v. *Mealey* . . ."

The "intrastate mileage" they are referring to is the intrastate part of interstate trips. The same apportionment formula was used in *Maine* v. *Grand Trunk* that was used in *Central Greyhound Lines* and that is used in §58-575 of the Code of Virginia. In *Maine* v. *Grand Trunk* the formula was held constitutional in the case of railroads. In *Central Greyhound Lines* the formula was held constitutional in the case of all public utilities. It is equally constitutional in the case of steamship lines.

In *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 93 L. ed. 585 (1949), the Supreme Court, reversing the courts below, for the first time held that property used for interstate transportation by water was taxable by a state

to the same extent as property used for interstate transportation by land. At page 174 the Court said:

> "We see no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' . . . So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State . . . Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.
>
> "There is such an apportionment under the formula of the *Pullman* case. Moreover, that tax, like taxes on property, taxes on activities confined solely to the taxing State, *or taxes on gross receipts apportioned to the business carried on there,* has no cumulative effect caused by the interstate character of the business. Hence there is no risk of multiple taxation. Finally, there is no claim in this case that Louisiana's tax discriminates against interstate commerce. It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders . . . We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

In support of the statement about apportioned taxes on gross receipts that I have underscored in the foregoing quotation, the Court, in footnote 5, cited *Maine* v. *Grand Trunk.*

The Louisiana tax in the *Ott* case was assessed on the market value of the vessels, and the Virginia tax is assessed on the going concern value of the steamship line.

Both are taxes on property measured by the value of the property apportioned to the taxing state. In Louisiana the value of the property was measured by its market price. In Virginia the value of the property is measured by its gross receipts. The Supreme Court cited *Maine* v. *Grand Trunk*, involving taxes on gross receipts, in support of its decision that the Louisiana tax was valid.

Consequently, the argument in favor of the constitutionality of § 58-575 of the Code of Virginia can be stated very briefly: *Maine* v. *Grand Trunk* holds constitutional an apportioned gross receipts tax involving land transportation. *Ott* v. *Mississippi Valley* holds that *Maine* v. *Grand Trunk* applies to water transportation.

The Virginia tax is called a license tax but is actually a property tax. Virginia does not seek to exclude these vessels from its ports and does not demand payment of the tax as a condition precedent to the privilege of entering its ports. To quote again from the *Ott* case, the Virginia tax is supported by the decisions of the Supreme Court of the United States holding:

> "that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders."

In *Canton Railroad Company* v. *Rogan*, 95 L. ed. Adv. Ops. 334, decided February 26, 1951, the Supreme Court of the United States said (p. 335):

> "The State of Maryland imposes on steam railroad companies a franchise tax, measured by gross receipts, apportioned to the length of their lines within the State."

And at page 337:

> "The objection of Maryland's tax on the ground that interstate commerce is involved is not well taken. It is settled that a nondiscriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the tax-

ing state (see *Western Live Stock* v. *Bureau of Revenue*, 303 US 250, 255, 82 L. ed. 823, 827, 58 S. Ct. 546, 115 ALR 944) and not reaching any activities carried on beyond the borders of the state. Where transportation is concerned, an apportionment according to the mileage within the state is an approved method. *Central Greyhound Lines* v. *Mealey*, 334 US 653, 663, 92 L. ed. 1633, 1641, 68 S. Ct. 1260."

Although the case involved a gross receipts tax on railroads, the use by the court of the expressions "an interstate enterprise" and "where transportation is concerned" makes it clear that the holding is not limited to railroad lines but includes steamship lines.

After the opinions in this case had been written, the Supreme Court of the United States, on March 26, 1951, handed down its decision in *Spector Motor Service, Inc.* v. *O'Connor*. In that case, the Court held that the imposition of the Connecticut tax on Spector was unconstitutional because:

1. The taxpayer was engaged *exclusively* in interstate commerce.
2. The tax was an excise tax.
3. The highest court of Connecticut *said* the tax was an excise tax.

The Supreme Court would have held the tax constitutional if the taxpayer had done *any* intrastate business, if the tax had been a property tax, *or* if the highest court of Connecticut had *said* that the tax was a property tax.

We have seen that the name by which the tax is called by the State *legislature* is immaterial. But the name by which the tax is called by the State *Supreme Court* is binding on the Supreme Court of the United States; or almost binding. Both of these rules were stated without qualification in *Dawson* v. *Kentucky Distilleries*, 255 U. S. 288, 292, *supra*. Some Supreme Court Justices qualify the second rule to the extent of holding that the State court's classification of a State tax as a property tax or an excise tax is not binding if the State court's decision is obvi-

ously fraudulent. Thus, in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662 at 671, the dissenting opinion said:

> "Mississippi's interpretation of the meaning of its statute is binding on this Court."

And qualified that statement in footnote 2 by saying:

> "Such determination may be rejected only if a palpable evasion for avoiding a contrary ruling under Federal law."

The four dissenting Justices in that case were among the six Justices who joined in the majority opinion in the *Spector* case. And the majority in the *Spector* case placed great stress on the fact that the highest court of Connecticut said the tax was an excise. They almost treated the Connecticut court's opinion as an admission against interest. They said:

> "After full consideration and with knowledge that its statement would be made the basis of determining the validity of the application of the tax under the Commerce Clause, that court said: . . ."

They then quoted the Connecticut court's statement that the tax was an *excise*, and said:

> "The tax is not levied as compensation for the use of the highways or collected in lieu of an *ad valorem* property tax. Those bases of taxation have been disclaimed by the highest court of the taxing State."

The dissenting Justices said:

> ". . . the tax is declared invalid simply because the State has verbally characterized it as a levy on the privilege of doing business within its borders. The Court concedes, or at least appears to concede, that if the Connecticut legislature or highest court had described the tax as one for the use of highways or in lieu of an *ad valorem* property tax, Spector would have had to pay the same amount, calculated in the

same way, as is sought to be collected here. In acknowledging this, the Court's own opinion totally refutes its protestation that the standard employed to strike down Connecticut's tax is more than a matter of labels."

Since the Virginia taxes on the franchises of public service companies are property taxes and not excise taxes, both the majority and the minority opinions in the *Spector* case agree that they are constitutional. If a State court holds that a tax is a property tax, and if that holding is not "a palpable evasion for avoiding a contrary ruling under Federal law," the question debated in the *Spector* case does not arise. The Virginia taxes are not merely "in lieu of" property taxes; they are property taxes.

APPENDIX "A-4"

Present: All the Justices.

COMMONWEALTH OF VIRGINIA,

v.

BALTIMORE STEAM PACKET COMPANY

Record No. 3888

OPINION BY JUSTICE ARCHIBALD C. BUCHANAN, Richmond, Virginia, December 3, 1951.

COMMONWEALTH OF VIRGINIA,

v.

NORFOLK, BALTIMORE AND CAROLINA LINE, INCORPORATED

Record No. 3889

FROM THE STATE CORPORATION COMMISSION

The appellees, steamship companies, herein referred to as Baltimore and Norfolk, applied to the State Corporation Commission for correction of assessments of state taxes made against them in 1950 by the Commission, based on their gross receipts for 1949, under the provisions of Title 58, Chapter 12, Article 7 of the Code. Their contention was that section 58-575,[1] Article 7, under which the tax was

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[1] § 58-575. Annual license tax.—Every such company for the privilege of doing business in this State, in addition to the annual registration fee and property tax, shall pay an annual State license tax as follows:

Such tax shall be equal to one and one-half per centum upon the gross receipts from operation up to and not in excess of five hundred thousand dollars and one and three-fourths per centum upon such receipts in excess of that amount of such companies, and each of them, within this State.

When such companies are operated partly within and partly without this State, the gross receipts within this

levied, was invalid because it violated the Commerce Clause, Article I, Section 8, clause 3, and the Duty of Tonnage Clause, Article I, Section 10, clause 3, of the Federal Constitution. Railway Express Agency, Inc., filed a brief in this Court as *amicus curiae*.

The points at issue on the two applications were the same. The facts were stipulated and the two cases heard together.

Baltimore is a Maryland corporation with its principal office in the city of Baltimore. During 1949 it owned and operated three steamships in the transportation of passengers and freight, two operating daily between the city of Baltimore, in Maryland, and the city of Norfolk, in Virginia, and the third between Washington, D. C., and Norfolk. Each vessel made a trip one way on alternate days, and each stopped at Old Point, in Virginia, for the purpose of receiving and discharging passengers and freight.

Norfolk is a Virginia corporation with its principal office in the city of Norfolk. In 1949 it owned and operated seven motor vessels, a tug, and a barge, in the transportation of freight between the city of Baltimore, Maryland, and Charleston, South Carolina, "via Norfolk and intermediate points for the purpose of receiving and discharging freight." During part of 1949 it operated a line intrastate in Virginia between Norfolk and Richmond, but that was abandoned after a few months of operation.

During the entire period of this controversy all of these

State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided that unless otherwise clearly shown such last mentioned receipts shall be deemed to be that proportion of the total receipts from such business which the entire line mileage over which the business is done bears to the mileage operated within this State.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and every tax year thereafter, until otherwise ordered by law. (1926, p. 955; 1928, p. 154; 1936, p. 534; 1938, p. 412; 1944, p. 110; Tax Code, § 222; 1948, p. 925.)

ships were duly enrolled and licensed in conformity with Title 46, Chapter 12, of the United States Code relating to the "Regulation of Vessels in Domestic Commerce," 46 USCA, § 251 ff., and each thereby became a ship and vessel of the United States, entitled to the privileges secured to such ships and vessels by Federal statutes and regulations for enrolling and licensing ships employed in the coasting trade.

For the tax years 1949 and 1950 both companies were assessed with and have paid, in addition to the annual registration fee, taxes on their floating equipment at Norfolk, land, structures and money on deposit, located in Virginia. Only the tax on money (and intangibles) is payable to the State; that on real estate and tangible personal property is payable to the localities. Code, § 58-574.

The Commission held that the companies were liable for the tax on receipts from their intrastate business; *i. e.*, "on business beginning and ending within this state," amounting to $34.31 in the case of Baltimore and $104.86 in the case of Norfolk. No cross-error was assigned to that ruling, and its correctness is not in issue on this appeal. But a majority of the Commission, Commissioner Catterall dissenting, held that the tax on receipts earned in this State on business "passing through, into or out of this State," was invalid, and the assessments were accordingly reduced, being a reduction of $18,981.20 on Baltimore's assessment and $2,365.59 on the assessment against Norfolk. From the latter ruling the Commonwealth appeals.

The Commission based its holding on two grounds: (1) That the assessment on interstate business was not made in accordance with the statute; and that if it had been, it would be invalid because not a proper apportionment, this because of the language of the statute that receipts earned in Virginia on interstate business, unless otherwise clearly shown (which was not attempted to be done here) shall be deemed to be that proportion of the total receipts "which the entire line mileage over which the business is done bears to the mileage operated within this State." Literally that formula results in an improper fraction, the numerator being greater than the denominator. That, of course,

was not intended, and no objection on that score was made by the appellees before the Commission. On the contrary, appellees stipulated that the amount of the tax "has been properly computed in accordance with the provisions of section 58-575 of the Code of Virginia." It is not necessary to resort to the formula to compute the tax. The actual receipts control if clearly shown. Appellees were content not to show them but, instead, to stipulate that the amount of the tax had been properly computed. We see no necessity for denying them the privilege of entering into that agreement, or for refusing to respect it in deciding the cases.

We do not think the assessments violated in any way the third clause of section 10, Article I of the Constitution, providing that "No state shall, without the consent of Congress, lay any duty of tonnage." That prohibition forbids a tax "upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state," and applies to taxes and duties "which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 56 S. Ct. 194, 80 L. ed. 215. 48 Am. Jur., Shipping, § 651, p. 454. This is not that sort of tax.

The main question is whether the assessments violate the Commerce Clause, Article I, Section 8, clause 3, of the Constitution. The decision of it is, of course, controlled by the rulings of the United States Supreme Court. It is a problem that has engaged the attention of that court many times and in many forms, and rarely has it been settled in a given case by a unanimous court. The difficulties began long ago and they have increased with the expansion of the definition of interstate commerce and the increasing complexities of trade. The statement of Mr. Justice Holmes in *Galveston &c. R. Co.,* v. *Texas,* 210 U. S. 216, 52 L. ed. 1031, 1036, that since "not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected," has proved prophetic.

On the same day in 1873 the Supreme Court decided the *Case of the State Freight Tax,* 82 U. S. 232, 21 L. ed. 146; and the case of the *State Tax on Railway Gross Receipts,* 82

U. S. 284, 21 L. ed. 164. In the former a tax on freight transported into or out of the State was held invalid as a direct burden on interstate commerce; in the latter a tax on the gross receipts of a railway company derived in part from interstate transportation was held constitutional, three justices dissenting.

Fourteen years later, in *Philadelphia &c. Mail Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, a tax levied on the gross receipts of a steamship company derived from freight and passengers carried on the ocean and navigable waters of the United States, and no part of which was received for transportation between places in the State, was held unconstitutional. The Court said that the State could not constitutionally regulate interstate or foreign commerce, and that taxation was one of the principal forms of regulation; that if the State could not tax the transportation it ought not to tax the freights and fares received therefrom. "It would seem to be rather metaphysics than plain logic for the State officials to say to the Company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' " The Court quoted this from *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158: " 'While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestc corporation engaged in that business, we are clear that a tax or other burden imposed upon the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and obstruction of, the power of Congress in the regulation of such commerce.' " 30 L. ed. at p. 1204.

In *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217, 35 L. ed. 994, (1891), the Court held valid a tax on the gross transportation receipts in the State of a railroad lying partly within and partly without the State, ascertained by multiplying its average gross receipts per mile over its whole

length by the number of miles in the State. The opinion held:

The tax "is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the State to levy there can be no question;" and, further, that the privilege of exercising the franchises of a corporation within a State is generally one of value; that the corporation should be made to bear some proportion of the burdens of government; that the granting of the privilege, whether the corporation be domestic or foreign, may be conferred upon such conditions as the State deemed most conducive to its interests; that it may require the payment of a specific sum each year, or apportion the amount according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years; that the rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable.

Referring to the ruling below that the tax was in effect the imposition of the tax upon the transportation receipts and, therefore, an interference with interstate commerce, the Court said: "A resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. * * * There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 687, 39 L. ed. 311, a Mississippi statute laid a levy, as a privilege tax, "in lieu of other State, county, and municipal taxes," upon the Telegraph Company, apportioned to its wire mileage in the State. It was held to be valid. The Court said that property in a State belonging to either a

foreign or domestic corporation engaged in interstate commerce could be taxed in the form of a tax for the privilege of exercising its franchises in the State, if the ascertainment is made dependent in fact on the value of its property situated in the State, and "if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." And, further, "the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

Galveston &c. R. Co. v. *Texas, supra,* was decided in 1908. There the statute imposed a tax equal to 1% on gross receipts on railroads "if such line of railroad lies wholly within the State." The lines of the railroads involved were wholly within the State but connected with other lines and a part, in some instances much the larger part, of their receipts was for the interstate carriage of passengers and of freight. The case was held to be ruled by *Philadelphia &c. Mail Steamship Co.* v. *Pennsylvania, supra,* and the tax invalid as being "merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax."

In the course of the majority opinion, by Mr. Justice Holmes, it was said that as the property of companies engaged in interstate commerce may be taxed, "and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged;" that the difficulty of distinction between taxes on property and taxes on receipts became greater "when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern," referring to *Wisconsin & M. R. Co.* v. *Powers,* 191 U. S. 379, 24 S. Ct. 107, 48 L. ed. 229.

It was said that in *Maine* v. *Grand Trunk, supra,* "The

estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax."

Again it was said that "Neither the State courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

No attempt was found in the statute "to reach the property and to let the interstate traffic and the receipts from it alone," but an inference was drawn from the judgment of the State court and from the argument "that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern." The Chief Justice and three justices dissented on the ground that the tax was not laid directly upon gross receipts, as in *Philadelphia &c. Mail Steamship Co.* v. *Pennsylvania, supra,* but was an occupation tax operating only incidentally on interstate commerce.

In *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298, 32 S. Ct. 218, an Oklahoma statute imposed on express companies and others a gross revenue tax "which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation," apportioned, as to a corporation operating partly within and partly without, on the ratio of its business in the State to

its whole business. The receipts of the express company, a non-resident, were largely from commerce among the States. In the unanimous opinion written by Mr. Justice Holmes it was held that the tax was invalid; that the scope and purpose of the act were too obvious to admit the view that it was a property tax, because all the property *and assets* were made subject to *ad valorem* tax, and therefore "this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of *Maine* v. *Grand Trunk R. Co.* * * * and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items."

On the same day, however, February 19, 1912, in *United States Exp. Co.* v. *Minnesota*, 223 U. S. 335, 32 S. Ct. 211, the Court in a unanimous opinion held valid a tax on gross receipts of the non-resident Express Company, "which shall be in lieu of all taxes upon its property," part of which receipts came from interstate commerce. The Court explained that the statute in *Galveston &c. R. Co.* v. *Texas*, *supra*, was condemned because it was an attempt to reach receipts from interstate commerce when it appeared that another tax on the property had already been levied, "covering its full value as a going concern;" and that upon like reasoning the statute of Oklahoma in the *Wells, Fargo & Co.* case, *supra*, had been condemned. The Court said that the statute presently under review was "the only mode prescribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction." Again: "The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation seeking to reach the value of the property of such companies in the State, measured by the receipts from business done within the State," and, "was not aimed exclusively at the avails of interstate commerce."

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, the Court, sustaining a tax on the receipts of advertising space by newspaper and magazine

publishers, repeated the frequently used phrase that "Even interstate business must pay its way, * * * and if the property devoted to interstate transportation is used both within and without the State, a tax fairly apportioned to its use within the State will be sustained;" that the vice characteristic of those which have been held invalid "is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed, * * * or added to, * * * with equal right by every State which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

In *Freeman* v. *Hewit*, 329 U .S. 249, 67 S. Ct. 274, Mr. Justice Rutledge, in his concurring opinion, note 13, p. 283 of 67 S. Ct., said that gross receipts taxes which have been sustained fall into the following groups: (a) Those which were fairly apportioned, and (b) Those which have been justified on a "local incidence" theory; and that gross receipts taxes which have not been sustained fall into these groups: (a) Those which were not fairly apportioned; (b) Those which were not apportioned and subjected interstate commerce to the risk of multiple taxation; (c) Those in which there was a discriminatory element in that they were directed exclusively "at transportation or communication;" (d) Those in which there was no discrimination but a possible multiple burden; and (e) Those in which there was no discrimination, no apportionment and no possibility of multiple burden.

Joseph v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 67 S. Ct. 815, held invalid a tax on gross income from stevedoring "obviously a 'continuation of the transportation,'" because not "a tax apportioned to income derived from activities within the taxing State;" but it is stated in the opinion that "a proper regard for the authority of the States and their right to require interstate commerce to contribute by taxes to the support of the State governments which make their interstate commerce possible, has led Congress, over a long period to leave intact the judicial rulings, referred to above, that apportioned, non-discrimi-

natory gross receipt taxes or those fairly levied in lieu of property taxes conformed to the requirements of the Commerce Clause."

A New York statute imposed a tax on the gross income of every utility doing business in the State "in addition to any and all other taxes and fees imposed by any other provision of law for the same period." In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 68 S. Ct. 1260, Greyhound contended that since the taxed transportation was interstate commerce it could not be subjected to the tax. The Court sustained that contention, on the ground that the tax was unapportioned, but held that the entire tax need not fall, as it might be fairly apportioned to the business done within the State by a fair method of apportionment; that on the record the tax might constitutionally be sustained on the receipts apportioned as to the mileage within the State. The case was therefore remanded for further proceedings. Three justices dissented on the ground that the transportation was intrastate.

Memphis Natural Gas Company, a Delaware corporation, owned and operated a pipe line which ran through Mississippi from and into other States. It did not engage in intrastate commerce in Mississippi. In additon to *ad valorem* taxes, Mississippi imposed "a franchise or excise tax" based on the value of the capital used, invested or employed within the State. The levy was sustained. The Court said that the State court had construed the statute as an exaction required as a recompense for the State's protection of lawful activities, and those local incidents were not the "taxable events" selected for the imposition of the *ad valorem* tax. "These local incidents were the basis for the franchise or excise tax now in controversy. No reason is perceived why Mississippi cannot exact this different tax for the same protection. It is as though the *ad valorem* rate had been increased." The Chief Justice and three justices dissented. *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 68 S. Ct. 1475, 1477.

Interstate Oil Pipe Line Co. v. *Stone*, 337 U. S. 662, 69 S. Ct. 1264, held valid a tax which the State court had construed to be a tax "merely on the privilege of operat-

ing a pipe line wholly within this State as a local activity." Four of the justices held that assuming the business to be interstate commerce as contended, the State had the power to impose the tax; that the statute was not invalid under the Commerce Clause because it imposed a direct tax on the privilege of engaging in interstate commerce, and that any notion to the contrary should not have survived *Maine* v. *Grand Trunk*, *supra*, which had recently been approved.[2] The rule was repeated that "we are concerned with the

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[2] One justice concurred in the judgment, solely on the ground that the business was intrastate commerce. The Chief Justice and three justices dissented on the grounds that the business was interstate commerce, that the State court had determined it to be a privilege tax, and that a privilege tax for carrying on wholly interstate transportation, although fairly apportioned, was unconstitutional. But the dissenting justices said:

"Where the corporate taxpayer conducts intrastate as well as interstate business, a franchise privilege or excise tax on the former is of course permissible. We have frequently upheld such a tax although it was measured by property or receipts which were used in or attributable to interstate business."

They further said that *Maine* v. *Grand Trunk*, *supra*, was inapposite because Interstate Company did a wholly interstate business, and that "Grand Trunk, concerning a tax on the privilege of exercising a franchise in Maine, can only be reconciled with the later cases commented upon at note 15 if Grand Trunk did an intrastate as well as an interstate business. A State franchise tax for that is permissible. See notes 16 and 17, *supra*. The method of apportionment employed in the Grand Trunk case has had approval as recently as the *Greyhound* case, 334 U. S. at page 663, 68 S. Ct. 1260, 1266, 92 L. ed. 1633. There was no approval of Grand Trunk in Greyhound as a precedent for a tax on the privilege of doing an interstate business. See 334 U. S. at p. 658, 68 S. Ct. at page 1263, 92 L. ed. 1633."

practical operation of challenged State tax statutes, not with their descriptive labels."

Two other cases, decided this year, should be noted. *Canton R. Co.* v. *Rogan*, —— U. S. ——, 71 S. Ct. 447, upheld, over objections based on the Import-Export and the Commerce Clauses of the Constitution, a Maryland franchise tax on steam railroad companies, apportioned to the length of their lines within the State. As to the Commerce Clause, the Court said:

> "The objection to Maryland's tax on the ground that interstate commerce is involved is not well taken. It is settled that a nondiscriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the taxing State, see *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255, 58 S. Ct. 546, 548, 82 L. ed. 823, and not reaching any activities carried on beyond the borders of the State. Where transportation is concerned, an apportionment according to the mileage within the State is an approved method. *Central Greyhound Lines of New York* v. *Mealey*, 334 U. S. 653, 68 S. Ct. 1260, 1266, 92 L. ed. 1633."

In *Spector Motor Service* v. *O'Connor*, —— U. S. ——, 71 S. Ct. 508, a Connecticut statute was held invalid which imposed a tax upon the franchise of a foreign corporation for the privilege of doing business within the State, the business consisting solely of interstate commerce, and the tax being at a non-discriminatory rate and fairly apportioned. The Court said that the "all-important 'operating incidence' of the tax" had been made clear by the holding of the State court, according to which "It is a 'tax or excise' placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State."

The Court pointed out that its decision did not conflict with the principle that "where a taxpayer is engaged both in intrastate and interstate commerce, a State may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge

by applying the tax rate to a fair proportion of the taxpayer's business done within the State, including both interstate and intrastate." Three justices dissented on the ground that the Connecticut tax "meets every practical test of fairness and propriety enunciated in cases upholding privilege taxes on corporations doing a mixed intrastate and interstate business."

It is repeated in this case that "It is not a matter of labels. The incidence of the tax provides the answer."

One other case is important to this controversy. *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432, involved the validity of *ad valorem* taxes levied by Louisiana and the city of New Orleans under assessments based on the ratio of the mileage in Louisiana to the mileage of the entire line, upon vessels used to transport freight in interstate commerce up and down the Mississippi and Ohio Rivers under certificates issued by the Interstate Commerce Commission. The vessels were within Louisiana only for the comparatively short periods required to discharge and take on cargo and to make necessary and temporary repairs. In holding the tax valid the Court said, "We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises;" that the problem under the Commerce Clause "is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various States in which it functions,'" the requirement being satisfied "if the tax is fairly apportioned to the commerce carried on within the State."

Our problem, therefore, comes down to the question of what kind of tax is levied by section 58-575. If it is an excise tax "placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State," then it is invalid. But if it is (1) for the privilege of carrying on intrastate business, fairly computed "by applying the tax rate to a fair proportion of the taxpayer's business done within the State, including both interstate and intrastate," it is valid, *Spector Motor Service* v. *O'Connor, supra;* or (2) if it is

in substance and effect a fairly apportioned tax on property, it is valid.

1. The tax is on gross receipts from operations "within this State." That applies, the statute says, to two, and only two, kinds of gross receipts: (a) receipts from business beginning and ending within this State, and (b) receipts *earned in this State* on business passing through, into or out of this State. If the facts and figures clearly show the amount of (b), they control; if not, (b) is ascertained on a mileage basis. There is no contention here that the rate has not been applied to a fair proportion of the taxpayer's business done within this State. It has been agreed, as stated, that the tax has been properly computed. Clearly the tax applies alike to all water carriers; it is not discriminatory against interstate commerce; no other State can tax the same activity, and we think it satisfies the constitutional requirement that it be not a tax upon the privilege of carrying on an exclusively interstate business, but a tax fairly apportioned to the business carried on within this State, as defined in the Supreme Court decisions, and therefore is a valid tax.

2. Title 58 of the Code, Taxation, provides in chapter 12 thereof, sections 58-503 through 58-685, a system of taxation of public service corporations, including railway and canal companies, express companies, steamship companies, and others. The general pattern of the system is that these companies pay to the locality taxes on real estate and tangible personal property; to the State taxes on intangible personal property and money, and in addition a tax, called a franchise tax in some cases and a license tax in others, measured by gross receipts. Provision is made for apportionment in the case of interstate transportation when necessary. The value of all property for taxation, tangible and intangible, is fixed by the State Corporation Commission.

In the case of steamship companies (and also express companies) the tax is denominated a license tax, and the requirement is that every such company shall pay it "for the privilege of doing business in this State, in addition to the annual registration fee and property tax." But

what it is called is not necessarily what it is. It is well settled that the name by which it is called is immaterial; that it is not a matter of labels; that the incidence of the tax provides the answer; that the operation of the statute and not its descriptive label is what governs. *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 41 S. Ct. 272; *Interstate Oil Pipe Line Co.* v. *Stone, supra; Spector Motor Service* v. *O'Connor, supra; Charlottesville* v. *Marks' Shows*, 179 Va. 321, 329, 18 S. E. 2d 890, 894.

Certainly section 58-575 does not impose a license tax in the sense that its payment is a prerequisite to the right to operate vessels in the navigable waters of the United States. It does not impose a tax on the privilege of navigation. The payment of the tax is not made a condition precedent to the right to carry on the business, as was the case in *Moran* v. *City of New Orleans*, 112 U. S. 69, 28 L. ed. 653, and *Harmon* v. *City of Chicago*, 147 U. S. 396, 37 L. ed. 216. It provides no criminal sanctions, but its enforcement is left to the ordinary means devised for the collection of taxes. *Postal Telegraph Cable Co.* v. *Adams, supra.*

Baltimore has been paying a tax on receipts from business "beginning and ending in Virginia" every year since 1915, but no license has ever been issued to it and the procedures prescribed in Article I, Chapter 7 of Title 58 for obtaining licenses have not been followed. "But where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax." *Charlottesville* v. *Marks' Shows, supra*, 179 Va. at p. 329, 18 S. E. 2d at p. 894.

If not a license tax, is it a tax on property or the equivalent of a tax on property?

In *City of Richmond* v. *Commonwealth*, 188 Va. 600, 619, 50 S. E. 2d 654, 663, the opinion of the State Corporation Commission in that case is quoted to the effect that our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of public service corporations, common to all such companies, and providing for the imposition of *ad valorem* taxes by the several localities in the State, on the basis of assessments or valuations fixed by the Commission. "A second and integral part of the

system provides that such companies shall pay a franchise tax measured by gross receipts which tax is devoted to the support of the State government. The constitutional and statutory provisions, providing for this dual method of taxing such companies uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exclude* such franchise value as may be inherent in such property."

We said in that opinion that the existing method of assessing the properties of the utility involved in that case was developed from the system prescribed for the assessment of railroad properties, and we quoted from a letter relating to railroad assessments written by Commissioner Epes, afterwards a justice of this court, saying in part:

"'The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company exclusive of any franchise value, good will, 'going concern value,' 'cost of establishing the business,' or other 'intangible' value of the company.'"

Likewise, in the 1941 Annual Report of the Commission, page 41, it was said:

"Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%."

It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their dual values, the dead value, or "the bare bones," to be taxed by the locality, and the live, or going concern value, to be taxed by the State for the protection and services rendered by it. That the going concern value is thus taxable, although the basic items of property on which it arises are used in interstate commerce, is established by numerous decisions of the Supreme Court, as set out above. This tax on the going concern value is in effect

an increase of the *ad valorem* rate, *Memphis Natural Gas Co.* v. *Stone, supra.* In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause.

The majority of the Commission felt bound by the fact that not since 1915, when the present section 58-575 was enacted as section 31 of Chapter 141, p. 197, 206, Acts 1915, has the Commission taxed water carriers on receipts from business "passing through, into or out of this State." This has been because in 1915 the Attorney General's office advised the Commission that that feature of the statute was unconstitutional. That opinion was based largely upon the holdings of the Supreme Court in *Galveston &c. R. Co.* v. *Texas, supra,* and *Meyer* v. *Wells, Fargo & Co., supra.* We think, in the light of the broader concept of the power of the States in the field of taxation as reflected by the more recent decisions, that is not a sound interpretation of the statute. Since that opinion the Legislature has re-enacted the statute with the same provision in it at least six times.[3] That of course is the opposite of a legislative sanction of an administrative procedure. This is not a case of a practical construction of an ambiguous statute by an administrative body over a long period, tacitly accepted by the legislature, and to be given weight by the courts. *Cf. Joyner, Jr., Com'r* v. *Matthews* and *Commonwealth* v. *Appalachian Electric Power Co.,* decided today. The practice here has resulted from an opinion received by the Commission that the statute was unconstitutional. That is purely a legal question which we now have the duty to decide. As the practice is contrary to the direction of a valid statute, as we hold, there is no reason against now correcting it.

The orders of the Commission are reversed and the cases remanded for further proceedings consistent herewith.

Reversed and remanded.

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[3] Acts, 1926, p. 955; Acts 1928, § 222, p. 153; Acts 1936, p. 534; Acts 1938, p. 412; Acts 1944, p. 110; Acts 1948, p. 924.

APPENDIX "A-5"

COMMONWEALTH OF VIRGINIA, STATE CORPORATION COMMISSION

At Richmond, January 3, 1952

Case No. 10163

Application of BALTIMORE STEAM PACKET COMPANY, For review of the 1950 assessment of the tax on gross receipts.

The following order of reversal having been received, it is ordered that the same be here recorded, and is in the following words and figures:

VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Monday the 3rd day of December, 1951.

Record No. 3888

COMMONWEALTH OF VIRGINIA, Appellant,

against

BALTIMORE STEAM PACKET COMPANY, Appellee.

Upon an appeal as of right from an order entered by the State Corporation Commission on the 15th day of January, 1951.

This day came again the parties, by counsel, and the Court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said order is erroneous. It is therefore adjudged, ordered and decreed that the said order be reversed and annulled, and that the appellant recover of the appellee her costs by her expended about the prosecution of her appeal aforesaid here, and the cause is remanded to

the said Corporation Commission to be further proceeded in, in accordance with the views expressed in the said written opinion of this Court.

Which is ordered to be certified to the said Corporation Commission.

A Copy,
Teste: M. B. WATTS, *Clerk.*

COMMONWEALTH OF VIRGINIA, STATE CORPORATION COMMISSION

APPELLANT'S COSTS:

Writ tax	$ 6.50
Printing	99.70
Attorney's fee	20.00
Small fees	5.00
Transcript	
Printing brief	13.95
Total	$145.15

Teste:

M. B. WATTS, *C. C.*

Accordingly, it is

Ordered:

(1) That the order of January 15, 1951, which cancelled the 1950 license tax assessed against Baltimore Steam Packet Company to the extent of $18,981.20, be amended to comply with the mandate of the Supreme Court of Appeals and that Baltimore Steam Packet Company be required to pay said amount of $18,981.20, together with a penalty thereon in the amount of 5%, into the State Treasury, in addition to the amount required by said order to be so paid.

(2) That Baltimore Steam Packet Company pay to the Commonwealth her costs in the amount of $145.15.

(3) That attested copies hereof be sent to counsel for Baltimore Steam Packet Company, to the Comptroller, to the Attorney General and to the Director of Public Service Taxation.

A True Copy:

Teste: /s/ N. W. ATKINSON,
Clerk of the State Corporation Commission.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Presentation of petition for appeal	1
Opinions below	2
Jurisdiction	3
Question presented	4
Statutes and constitutional provisions involved	5
The statutes of Virginia involved	5
The Constitutional Provisions Involved	6
The statutes of the United States involved	7
Statement	7
The question presented is substantial	9
Conclusion	15
Appendix "A-3"	16
Appendix "A-6"—Order of the Corporation Commission of January 3, 1952	18

Table of Cases Cited

American Barge Line Co. v. *Koontz*, 68 S.E. 56	9, 10
California State Auto Assn. Inter-Insurance Bureau v. *Maloney, Ins. Commr.*, 341 U.S. 105	4
Cities Service Gas Co. v. *Peerless Oil & Gas Co.*, 340 U.S. 179	4
Dean Milk Co. v. *City of Madison, Wis.*, 340 U.S. 349	4
Gibbons v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23	13
Harmon v. *City of Chicago*, 147 U.S. 396	14
Hughes v. *Fetter*, 341 U.S. 609	4
Niemotko v. *State of Maryland*, 340 U.S. 268	4
Richfield Oil Corp. v. *State Board of Equalization*, 329 U. S. 69	4
Western Maryland Ry. Co. v. *Rogan*, 340 U.S. 520	4

Statutes Cited

Constitution of the United States:	
Article I, Sec. 8, paragraphs 1, 2 & 3	4, 6, 11, 15
Article I, Sec. 10, paragraph 3	4, 7

Page

United States Code:
Title 28:
Section 1257(2) 3, 4
Section 2101(c) 3, 4
Title 46:
Chapter 12 ..... 7, 12
Virginia Code of 1950:
Section 58-570 5
Section 58-575 ..... 4, 5, 12
Section 58-576 5
Section 58-577 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 672

NORFOLK, BALTIMORE AND CAROLINA LINE, INCORPORATED,

Appellant,

vs.

COMMONWEALTH OF VIRGINIA,

Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Appeals of Virginia entered in the above entitled cause on December 3, 1951.

Presentation of Petition for Appeal

In making preparation for the presentation of application for the allowance of an appeal in compliance with Rule 36, paragraph 1 of the revised rules of the Supreme Court of the United States, this petitioner, by counsel, communicated with the Clerk of the Supreme Court of Appeals of Vir-

ginia with a view to presenting the within application to the Chief Justice of said last mentioned Court and was advised by said Clerk by letter dated December 12, 1951 that "Our Chief Justice usually declines to grant the appeal and refers the matter to the United States Justice". Copy of said letter is hereto attached, made a part hereof and marked Appendix "A-1".*

The foregoing policy was on the 28th day of December, 1951, confirmed by Chief Justice Edward W. Hudgins of the Supreme Court of Appeals of Virginia in a telephone conversation had with him by John W. Oast, Jr., Esq., Counsel for Norfolk, Baltimore and Carolina Line, Incorporated, as will appear from affidavit of Mr. Oast which is hereto attached, made a part hereof and marked Appendix "A-2".*

The foregoing explanation is presented in order to justify the adoption of the alternative course afforded by Rule 36, Paragraph 1, *supra*, in making this application for the allowance of an appeal to one of the Justices of the Supreme Court of the United States.

Opinions Below

The opinion of the Corporation Commission of Virginia rendered herein in the above entitled proceeding (designated in the records of said Commission as Case No. 10168 and the opinions therein referred to as having been rendered in the proceedings before said Commission entitled "Case No. 10163—application of Baltimore Steam Packet Company"); and the opinion of the Supreme Court of Appeals of Virginia rendered in the above entitled proceeding and the related case of *Commonwealth of Virginia* v. *Baltimore Steam Packet Company*, No. 3888, and

* (CLERK'S NOTE.—Appendices "A-1," "A-2," "A-4" and "A-5" are printed as Appendices to the Statement as to Jurisdiction in No. 671, O. T. 1951 and are not reprinted here.)

the order of the Corporation Commission of Virginia entered on January 3, 1952, in Case No. 10168, are hereto attached and marked respectively Appendix "A-3", Appendix "A-4",* Appendix "A-5" * and Appendix "A-6".

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia is a final judgment and was entered on December 3, 1951. A petition for appeal is herewith presented to the Supreme Court of the United States, to-wit, on February 14, 1952. The jurisdiction of the Supreme Court of the United States for a review of the decision of the Supreme Court of Appeals of Virginia by direct appeal is conferred by Title 28, United States Code, Annotated, Sections 1257 (2) and 2101 (c). The following statutes and decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Appeals of Virginia on direct appeal in this case:

(a) Title 28, United States Code, Section 1257 (2) reads as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the *ground of its being repugnant to the Constitution*, treaties *or laws* of the United States, and *the decision is in favor of its validity*. (Italics supplied.)

Title 28, United States Code, Section 2101 (c) reads as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within *ninety days* after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days. (Italics supplied.)

(b) The jurisdiction of the Supreme Court of the United States to review the above judgment on this direct appeal pursuant to the Statutes (United States Code, Section 1257 (2) and United States Code, Section 2101 (c) *supra*) is clearly sustained by its decisions, as the question here presented is constitutional.

Richfield Oil Corporation v. *State Board of Equalization*, 329 U. S. 69;

Cities Service Gas Co. v. *Peerless Oil & Gas Co., et al.*, 340 U. S. 179;

Dean Milk Co. v. *City of Madison, Wis., et al.*, 340 U. S. 349;

Niemotko v. *State of Maryland*, 340 U. S. 268;

Western Maryland Railway Co. v. *Rogan*, 340 U. S. 520;

California State Auto Ass'n Inter-Insurance Bureau v. *Maloney, Ins. Comm'r.*, 341 U. S. 105;

Hughes v. *Fetter, et al.*, 341 U. S. 609.

Question Presented

Whether the annual license tax sought to be exacted from the appellant herein for the privilege of doing business in Virginia, pursuant to Virginia Code, 1950, Title 58, Section 58-575, is an excise tax and not a property tax and therefore is unconstituional, it being violative of the Constitution of the United States, Article I, Section 8, Paragraphs 1, 2 and 3, and Acts of Congress passed pursuant thereto, and Article I, Section 10, Paragraph 3 of said Constitution, and Acts of Congress passed pursuant thereto, and is consequently null, void and of no effect, in that said Virginia Statute imposes a burden upon Interstate Commerce carried on by the vessels of the Norfolk, Baltimore and Carolina Line as common carriers under the licenses and enrollments issued pursuant to the Statutes of the United States in such cases made and provided.

Statutes and Constitutional Provisions Involved

The Statutes of Virginia Involved

The statutes of Virginia involved are Virginia Code, 1950, §§ 58-570, 58-575, 58-576 and 58-577, reading as follows:

"§§ 58-570. Annual report.—Each and every corporation which operates steamships, steamboats or other floating property for the transportation of passengers or freight shall report annually, on or before the first day of May, to the Commission, all of its real and personal property of every description in this State belonging to it as of the beginning of the first day of January preceding, showing particularly in what city, town and school district the property is located and classifying the same under the following heads:

"(1) All steamships, steamboats and other floating property, their machinery and equipments;

"(2) All wharves, sheds, offices, stores, docks, machine shops, granaries, elevators and other buildings;

"(3) All real estate and personal property not included in the foregoing classes.

"Each such corporation shall also give in such report:

"(a) The total number of miles operated within and without this State for the year ending December thirty-first next preceding; (b) the gross receipts from operations entirely within this State and if operations are partly within and partly without this State the entire gross receipts from operations for the year ending December thirty-first next preceding; and (c) any and all other information in such manner and in such detail as the Commission shall require. (1928, p. 152; Tax Code, § 221.)"

"§ 58-575. Annual *license* tax.—Every such company for the *privilege* of doing business in this State, *in addition* to the annual registration fee and property tax, shall pay an annual State *license* tax as follows: (Italics supplied).

"Such tax shall be equal to one and one-half per centum upon the gross receipts from operation up to and not in excess of five hundred thousand dollars and one and three-fourths per centum upon such receipts in excess of that amount of such companies, and each of them, within this State.

"When such companies are operated partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided that unless otherwise clearly shown such last mentioned receipts shall be deemed to be that proportion of the total receipts from such business which the entire line mileage over which the business is done bears to the mileage operated within this State.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and every year thereafter, until otherwise ordered by law. (1926, p. 955; 1928, p. 154; 1936, p. 534; 1938, p. 412; 1944, p. 110; Tax Code § 222; 1948, p. 925)."

"§ 58-576. Payment of tax.—Such corporation shall pay into the State treasury by the first of October following the taxes assessed against it. (1928, p. 153; Tax Code, § 221.)"

"§ 58-577. Penalty for failure to pay.—Any such corporation failing to pay such taxes into the State treasury within the time herein prescribed shall incur a penalty thereon of five per centum, which shall be added to amount of the taxes. (1928, p. 153; Tax Code, § 221.)"

The Constitutional Provisions Involved

The Constitutional provisions involved are: Article I, Section 8, Paragraphs 1, 2, and 3 of the Constitution of the United States, reading as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts

and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

"To borrow money on the credit of the United States;

"To regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

Article I, Section 10, Paragraph 3 of the Constitution of the United States, reading as follows:

> "No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

The Statutes of the United States Involved

The statutes of the United States involved are:

Title L "Regulation of Vessels in Domestic Commerce" of the revised statutes of the United States; and

United States Code, Title 46, Chapter 12, pertinent portions of which will be seen by reference thereto.

Statement

We here quote the succinct statement of facts here involved, from the opinion of Justice Buchanan of the Supreme Court of Appeals of Virginia:

> "The appellees, steamship companies, herein referred to as Baltimore and Norfolk, applied to the State Corporation Commission for correction of assessments of state taxes made against them in 1950 by the Commission, based on their gross receipts for 1949, under the provisions of Title 58, Chapter 12, Article 7 of the Code. Their contention was that section 58-575, Article 7, under which the tax was levied, was invalid be-

cause it violated the Commerce Clause, Article I, Section 8, clause 3, and the Duty of Tonnage Clause, Article I, Section 10, clause 3, of the Federal Constitution. Railway Express Agency, Inc., filed a brief in this court as *amicus curiae*.

The points at issue on the two applications were the same. The facts were stipulated and the two cases heard together.

Baltimore is a Maryland corporation with its principal office in the city of Baltimore. During 1949 it owned and operated three steamships in the transportation of passengers and freight, two operating daily between the city of Baltimore, in Maryland, and the city of Norfolk, in Virginia, and the third between Washington, D. C., and Norfolk. Each vessel made a trip one way on alternate days, and each stopped at Old Point, in Virginia, for the purpose of receiving and discharging passengers and freight.

Norfolk is a Virginia corporation with its principal office in the city of Norfolk. In 1949 it owned and operated seven motor vessels, a tug, and a barge, in the transportation of freight between the city of Baltimore, Maryland, and Charleston, South Carolina, "via Norfolk and intermediate points for the purpose of receiving and discharging freight." During part of 1949 it operated a line intrastate in Virginia between Norfolk and Richmond, but that was abandoned after a few months of operation.

During the entire period of this controversy all of these ships were duly enrolled and licensed in conformity with Title 46, Chapter 12, of the United States Code relating to the "Regulation of Vessels in Domestic Commerce," 46 U. S. C. A., § 251 ff., and each thereby became a ship and vessel of the United States, entitled to the privileges secured to such ships and vessels by Federal statutes and regulations for enrolling and licensing ships employed in the coasting trade.

For the tax years 1949 and 1950 both companies were assessed with and have paid, in addition to the annual registration fee, taxes on their floating equipment at

Norfolk, land, structures and money on deposit, located in Virginia. Only the tax on money (and intangibles) is payable to the State; that on real estate and tangible personal property is payable to the localities. Code, § 58-574.

The Commission held that the companies were liable for the tax on receipts from their intrastate business; i. e., "on business beginning and ending within this State," amounting to $34.31 in the case of Baltimore and $104.86 in the case of Norfolk. No cross-error was assigned to that ruling, and its correctness is not in issue on this appeal. But a majority of the Commission, Commissioner Catterall dissenting, held that the tax on receipts earned in this State on business "passing through, into or out of this State," was invalid, and the assessments were accordingly reduced, being a reduction of $18,981.20 on Baltimore's assessment and $2,365.59 on the assessment against Norfolk. From the latter ruling the Commonwealth appeals. * * *"

The Question Presented Is Substantial

It is submitted that the importance of the question herein presented is beyond dispute. The Virginia Section, 58-575, supra, was ruled unconstitutional by the Assistant Attorney-General of Virginia, Christopher B. Garnett in 1915. His opinion is attached as an exhibit to Appendix "A-4", supra. It was not until 1949 when the State Corporation Commission of Virginia, for the first time after 1915, made an assessment under that Section, that assessment was ruled invalid by a majority of that commission, per the opinion of Commissioner King, supra. The importance of the question is somewhat emphasized by the length of the opinion of the Supreme Court of Appeals of Virginia, supra. The importance of this question is demonstrated by the decision of the Supreme Court of Appeals, of West Virginia, in the case of *American Barge Line Co.* v. *Koontz*, 68 S. E. 56, decided on December 20, 1951, which will be observed is the

reverse of the conclusion of the Supreme Court of Appeals of Virginia in the case at bar, and so presents a conflict between the respective Supreme Courts of Virginia and West Virginia which this Court should resolve.

In the case of the *American Barge Line Co.* v. *Koontz, supra,* the Supreme Court of Appeals of West Virginia said:

> "The crucial and dispositive question is whether the statute here considered, as applied to gross income from interstate transportation, violates the commerce clause of the Constitution of the United States, Article I, Section 8. The navigable waterways of this country are free. No one is entitled to exclusive right to use a waterway for transportation purposes by virtue of a license issued by a state. Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23. It will be noted that Code, 11-12A, as amended, explicitly taxes the privilege of transporting passengers and freight by steamboat, steamship, or other floating property. However disguised, undoubtedly the statute authorizes a tax on a percentage of gross income derived by the plaintiffs from purely interstate business transacted in part in this state and in other states. The conclusion is inescapable that this statute, insofar as it attempts to tax gross income from interstate commerce on an apportionment basis, unreasonably burdens interstate commerce. That portion of the statute authorizing such tax even on the apportionment basis, as disclosed by this record, is contrary to the provisions of Article I, Section 8 of the Constitution of the United States. Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227. See Joseph v. Carter & Weeks Co., 330 U. S. 422, 67 S. Ct. 815, 91 L. Ed. 993; Spector Motor Service v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; Norton Co. v. Department of Rev., 340 U. S. 534, 71 S. Ct. 377, 95 L. Ed. 517; Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384, 55 S. Ct. 477, 79 L. Ed. 934; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295; Galveston, Harrisburg & S. A. Ry. Co. v. Texas, 210 U. S. 217, 28 S. Ct. 638, 52 L. Ed. 1031;

Philadelphia S. M. Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200; Moran v. New Orleans, 112 U. S. 69, 5 S. Ct. 38, 28 L. Ed. 653."

Under Article I, Section 8, Paragraphs 1, 2 and 3 of the Constitution of the United States, Congress is given power, among other subjects, to regulate commerce among the several states. Transportation has uniformly been held to be commerce and the authority thereover is plenary and its exercise exclusively vested in Congress.

The genesis of the Constitution is largely attributable to the controversies arising among the several states under the Confederation resulting from the placing of embargoes by one state upon the products of another. This rivalry became so acute, especially as between Connecticut, New York and New Jersey on the one hand and Maryland and Virginia on the other, that at a conference held at Mount Vernon in 1785, it was determined to call a convention of the several states to be held at Annapolis in 1786 to provide a remedy. These preliminary conferences resulted in the convening of the convention of 1787 at Philadelphia which drafted the Constitution which was afterwards ratified by the several states. Familiarity with this historical background justifies the conclusion that the regulation of commerce was the motivating reason leading to the final adoption of the Constitution.

In the absence of good roads and railroads, the chief means of intercourse between the several states was by water, and Congress, by virtue of its constitutional authority and obligation, soon passed the necessary legislation looking to the exclusive regulation of waterborne traffic by the adoption of appropriate legislation looking to the licensing and enrollment of vessels engaged in the coastwise trade. This legislation resulted in the provisions found in the revised statutes of the United States, Title L "Regulation of Vessels

in Domestic Commerce" and now set out at length in United States Code, Title 46, Chapter 12, pursuant to which the Consolidated Certificates of Enrollment and License were issued to each of said steamships belonging to the petitioner, Norfolk, Baltimore and Carolina Line, Incorporated. As a result of said enrollment and licensing, each of said steamships became and is a ship and vessel of the United States and as such entitled to the privileges secured to such ships and vessels by the regulations and acts of Congress aforesaid for enrolling and licensing ships to be employed in the coasting trade.

It is earnestly asserted that the steamships in question, having been duly enrolled and licensed, they and their owner and operator, Norfolk, Baltimore and Carolina Line, Incorporated, are immune from the imposition of any condition or the collection of any license tax by the State of Virginia or any other taxing power other than the United States for exercising the privilege granted pursuant to the Consolidated Certificates of Enrollment and License held by them.

Virginia Code, 1950 § 58-575, provides an annual license tax and that "Every such company for the *privilege* of doing business in this State, in addition to the annual registration fee and property tax, shall pay an annual State license tax as follows:" (Italics supplied). There follows the basis of assessment, and a provision for apportionment of receipts when operating partly within and partly without the State. It is contended and the position is supported by ample authority hereinafter referred to, that the imposition of a condition or a tax upon an enrolled vessel or its owner or operator is unconstitutional, even though the operation of the vessel is confined to navigable waters lying entirely within the taxing state, if such waters connect with others susceptible of use in interstate commerec.

This is established by *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23.—Opinion by Chief Justice Marshall.

> Headnote.—"The acts of the Legislature of the State of New York, granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the Constitution of the United States which authorized Congress to regulate commerce, so far as the said acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam".

Pages 211 to 215, both inclusive, discuss at length the privileges enjoyed by a vessel duly licensed in the coasting trade.

Final decree, pages 239, 240, provides as follows:

> "Decree.—This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and Correction of Errors of the State of New York, and was argued by counsel. On consideration whereof, this court is of opinion that the several licenses to the steamboats, the Stoudinger and the Bellona, to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery for the State of New York, which were granted under an act of Congress, passed in pursuance of the constitution of the United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding; and that so much of the several laws of the State of New York, as prohibits vessels, licensed according to the laws of the United States, from navigat-

ing the waters of the State of New York, by means of fire or steam, is repugnant to the said constitution, and void. This Court is therefore of opinion, that the decree of the Court of New York for the Trial of Impeachments and the Correction of Errors, affirming the decree of the Chancellor of that State, which perpetually enjoins the said Thomas Gibbons, the appellant, from navigating the waters of the State of New York with the steamboats the Stoudinger and the Bellona, by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled. And this Court doth further direct, order and decree, that the bill of the said Aaron Ogden be dismissed, and the same is hereby dismissed accordingly."

In dealing with a situation very similar to that at bar, Mr. Justice Field, in *Harmon* v. *City of Chicago,* 147 U. S. 396, answers the contention of the Commonwealth of Virginia, as made below to the effect that Section 58-575 of the Virginia Code, did not require a license:

"In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No state can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge, or tow-boat, towing vessels or craft for hire in the Chicago river or its branches shall have a license from the city of Chicago, is equivalent to declaring such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions im-

posed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign."

Conclusion

It is submitted that the decision of the Supreme Court of Appeals of Virginia fails to recognize the constitutional prohibition of the United States Constitution, Article I, Section 8, Paragraph 3, which preserves the waters of the United States for the free use by the vessels of the United States. We believe that the question presented by this appeal is substantial and that it is of public importance.

Respectfully submitted,

JOHN W. OAST, JR.,
Attorney for Norfolk, Baltimore and Carolina Line, Incorporated, Appellant.

Norfolk, Virginia.
February 12, 1952.

APPENDIX "A-3"

COMMONWEALTH OF VIRGINIA BEFORE THE STATE CORPORATION COMMISSION OF VIRGINIA AT RICHMOND

Case No. 10168

COMMONWEALTH OF VIRGINIA, *Appellant*

v.

NORFOLK, BALTIMORE & CAROLINA LINE, INCORPORATED, *Appellee*

OPINION OF THE COMMISSION—March 21, 1951

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

Richmond, Virginia

Case No. 10168

COMMONWEALTH OF VIRGINIA, *Appellant*

vs.

NORFOLK, BALTIMORE & CAROLINA LINE, INCORPORATED, *Appellee*

Appearances:

John W. Oast, Jr., Counsel for Applicant; Henry T. Wickham, Assistant Attorney General; Norman S. Elliott, Counsel for the Commission.

OPINION

KING, *Commissioner:*

This case is a companion case to Case No. 10163—Application of Baltimore Steam Packet Company, and was heard by the Commission at the same time as that case.

As in Case No. 10163, the Commission for the year 1950 had, under the provisions of Section 58-575 of the Code, assessed a license tax against Norfolk, Baltimore & Carolina Line, Incorporated, in the total amount of $2,470.45, based on its total gross receipts for the year 1949, of which sum $104.86 was upon intrastate receipts and $2,365.59 upon interstate receipts. In the final order entered on January 16, 1951, upon the application of applicant, Norfolk, Baltimore & Carolina Line, Incorporated, for review and correction of that assessment, the Commission sustained the assessment of the 1950 license tax of Norfolk, Baltimore & Carolina Line, Incorporated, in the amount of $104.86, based upon its 1949 intrastate gross receipts, but cancelled that portion of its 1950 license tax, to-wit, the sum of $2,365.59, which was based upon its 1949 interstate gross receipts.

Norfolk, Baltimore & Carolina Line is a Virginia corporation, which since its organization in 1923 has been engaged principally in the interstate transportation of freight by boat between Baltimore, Maryland and Charleston, South Carolina, via Norfolk and intermediate points. During part of the year 1949, it operated intrastate in Virginia a line between Norfolk and Richmond, but that line was abandoned after a few months of operation. During 1949, the Company owned and used in its business six motor vessels, a tug and a barge, which were duly enrolled and licensed by the United States pursuant to the provisions of Title 46, Chapter 12, United States Code.

For the tax years 1949 and 1950, the applicant was assessed and has paid its annual registration fee and taxes upon its floating equipment, structures, miscellaneous property and money on deposit. Because of the fact that prior to 1949 applicant had not been engaged in intrastate business in Virginia but had only been engaged in interstate commerce, no license tax had ever been assessed under Section 58-575 of the Code against it. However, in 1950 a license tax in the amount of $2,470.45, based upon the applicant's interstate and intrastate gross receipts was assessed, and applicant brought this proceeding for review and correction of that assessment, which resulted in the Commission's decision of January 16, 1951.

The reasons for the Commission's decision in this case are fully set forth and discussed in the opinion of the Commission in Case No. 10163 and will not be repeated here. That opinion is adopted by the Commission as its opinion in this case to the same extent as if fully copied herein.

Hooker, Commissioner, concurs.

Catterall, Chairman, dissents for the reasons given in his dissenting opinion in Case No. 10163—Application of Baltimore Steam Packet Company.

APPENDIX "A-6"

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

At Richmond, January 3, 1952

Case No. 10168

Application of NORFOLK, BALTIMORE AND CAROLINA LINE, INCORPORATED. For review of the 1950 assessment of the tax on gross receipts..

The following order of reversal having been received, it is ordered that the same be here recorded, and is in the following words and figures:

VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Monday the 3rd day of December, 1951.

Record No. 3889

COMMONWEALTH OF VIRGINIA, Appellant,

against

NORFOLK, BALTIMORE and CAROLINA LINE, INCORPORATED, Appellee

Upon an appeal as of right from an order entered by the State Corporation Commission on the 16th day of January, 1951.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said order is erroneous. It is therefore adjudged, ordered and decreed that the said order be reversed and annulled, and that the appellant recover of the appellee her costs by her expended about the prosecution of her appeal aforesaid here, and the cause is remanded to the said corporation commission to be further proceeded in, in accordance with the views expressed in the said written opinion of this court.

Which is ordered to be certified to the said Corporation Commission.

A Copy.

Teste: M. B. WATTS,
Clerk.

Appellant's costs:

Writ tax	$ 6.50
Printing	51.70
Attorney's fee	20.00
Small fees	5.00
Transcript	
Printing brief	13.95
Total	$97.15

Teste: M. B. WATTS,
C. C.

Accordingly, it is

ORDERED:

(1) That the order of January 16, 1951, which cancelled the 1950 license tax assessed against Norfolk, Baltimore and Carolina Line, Incorporated, to the extent of $2,365.59, be amended to comply with the mandate of the Supreme Court of Appeals and that Norfolk, Baltimore and Carolina Line, Incorporated, be required to pay said amount of $2,365.59, together with a penalty thereon in the amount of 5%, into

the State Treasury, in addition to the amount required by said order to be so paid.

(2) That Norfolk, Baltimore and Carolina Line, Incorporated, pay to the Commonwealth her costs in the amount of $97.15.

(3) That attested copies hereof be sent to counsel for Norfolk, Baltimore and Carolina Line, Incorporated, to the Comptroller, to the Attorney General and to the Director of Public Service Taxation.

A True Copy.

Teste: N. W. ATKINSON,
Clerk of the State Corporation Commission.

14

Office - Supreme Court, U. S.
FILED
MAR 24 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 671

BALTIMORE STEAM PACKET COMPANY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee

No. 672

NORFOLK, BALTIMORE AND CAROLINA LINE, INCORPORATED,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee

APPEALS FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

J. LINDSAY ALMOND, JR.,
Attorney General of Virginia;
HENRY T. WICKHAM,
Assistant Attorney General of Virginia,
Counsel for Appellee.

INDEX

Subject Index

	Page
Statement of Appellee Opposing Jurisdiction and Motion to Dismiss or Affirm	1
I. The State Statute Involved and the Nature of the Case	2
A. The Statute	2
B. The Facts	3
C. The Proceedings Below	4
D. The Questions Presented	6
II. Argument	7
A. The Tax in Question is Not a "Duty of Tonnage"	7
B. The Virginia Statute Does Not Require a License For The Privilege of Navigating in Coastal Waters	7
C. The Tax Involved in This Case is a Property Tax Thus Making it Clear That No Substantial Federal Question is Presented	9
III. Conclusion	12

Table of Citations

Cases:

American Barge Line Co. v. *Koontz*, — W. Va. —, 68 S. E. (2d) 56	9
Canton R. Co. v. *Rogan*, 340 U. S. 511	11
Central Greyhound Lines v. *Mealey*, 334 U. S. 653	11
City of Richmond v. *Commonwealth*, 188 Va. 600, 50 S. E. (2d) 654	10
Dawson v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 292	8
Gibbons v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23	8
Harmon v. *City of Chicago*, 147 U. S. 396	8
Interstate Oil Pipe Line Co. v. *Stone*, 337 U. S. 662, 666	8

Page

Maine v. *Grand Trunk Ry.*, 142 U. S. 217 11
Memphis Natural Gas Co. v. *Stone*, 335 U. S. 80 11
Moran v. *City of New Orleans*, 112 U. S. 69 8
Ott v. *Mississippi Val. Barge Line Co.*, 336 U. S. 169 11
Spector Motor Service v. *O'Connor*, 340 U. S. 602 11
Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250 11

Statutes:

Code of Virginia:

Article 2, Chapter 12 of Title 58 10
Article 4, Chapter 12 of Title 58 10
Article 7, Chapter 12 of Title 58 10
Article 8, Chapter 12 of Title 58 10
Article 10, Chapter 12 of Title 58 10
Article 14, Chapter 12 of Title 58 10
Section 58-575 ..... 2, 8

Other Authorities:

Article I, Section 8, of the Constitution of the U. S. 2
Article I, Section 10 of the Constitution of the U. S. 6
Constitutional Debates of Virginia, 1902, p. 2671 11

SUPREME COURT OF THE UNITED STATES

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No. 671

BALTIMORE STEAM PACKET COMPANY,
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COMMONWEALTH OF VIRGINIA,
Appellee

No. 672

NORFOLK, BALTIMORE AND CAROLINA LINE, INCORPORATED,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee

APPEALS FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions presented by these appeals, files this statement in opposition to the appellants' statement as to jurisdiction. The appellee

includes herein its motion to dismiss the appeals or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of Virginia on the ground that the questions raised on behalf of the appellants are so unsubstantial as not to need further argument. The matters here relied upon are more particularly stated below:

I

The State Statute Involved and the Nature of the Case

A. The Statute

The appellants contend that section 58-575 of the Code of Virginia, which authorizes a tax based on the gross receipts of steamship and other water carriers, is invalid because it violates the Commerce Clause of the Constitution of the United States, i. e. Article I, Section 8, Paragraph 3. This statute is found in Chapter 12 of Title 58 of the Code of Virginia dealing with the taxation of "Public Service Corporations" and reads as follows:

> "Section 58-575. Annual license tax.—Every such company for the privilege of doing business in this State, in addition to the annual registration fee and property tax, shall pay an annual State license tax as follows:
>
> "Such tax shall be equal to one and one-half per centum upon the gross receipts from operation up to and not in excess of five hundred thousand dollars and one and three-fourths per centum upon such receipts in excess of that amount of such companies, and each of them, within this State.
>
> "When such companies are operated partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into

or out of this State; provided that unless otherwise clearly shown such last mentioned receipts shall be deemed to be that proportion of the total receipts from such business which the entire line mileage over which the business is done bears to the mileage operated within this State.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and every tax year thereafter, until otherwise ordered by law. (1926, p. 955; 1928, p. 154; 1936, p. 534; 1938, p. 412; 1944, p. 110; Tax Code, Section 222; 1948, p. 925.)"

B. The Facts

Since the principles of law involved in these cases are identical, and since the State Corporation Commission of Virginia and the Supreme Court of Appeals of Virginia heard and considered them together, they will be so considered and treated on appeal before this Court.

The appellant, Baltimore Steam Packet Company, was incorporated in the State of Maryland in 1839 with its principal offices in the City of Baltimore. It is the owner and operator of three steamships, all of which are engaged in the transporting of freight and passengers, two operating between Baltimore, Maryland and Norfolk, Virginia, and the other operating between Washington, D. C. and Norfolk, Virginia. All of the said steamships stop at Old Point Comfort, Virginia, for the purpose of receiving and discharging freight and passengers.

The appellant, Norfolk, Baltimore and Carolina Line, Incorporated, was incorporated in the State of Virginia in 1923 with its principal offices in the City of Norfolk. It is the owner and operator of seven motor vessels, a tug and a barge, all of the said motor vessels being engaged in the transportation of freight between Baltimore, Maryland and Charleston, South Carolina, via Norfolk and intermediate

points. During part of the year 1949, "Norfolk" operated in intrastate commerce between Richmond and Norfolk.

All of the above mentioned steamships and motor vessels, and the tug and barge owned and operated by "Norfolk", are duly enrolled and licensed in conformity with the Statutes of the United States, and as a result thereof, each of said ships and vessels is a ship and vessel of the United States and is entitled to the privileges secured to such ships and vessels by the regulations and Acts of Congress for enrolling and licensing ships and vessels to be employed in the coasting trade.

Both steamship companies have paid, in addition to the annual registration fee assessed against them, taxes on floating equipment, structures and money on deposit, all of which property is located in the State of Virginia.

"Baltimore", in addition to the payment of taxes on the above mentioned properties, has paid taxes on land located in the State of Virginia, and on gross receipts on business done in the State during the calendar year ending December 31, 1948.

C. The Proceedings Below

In September, 1950, "Baltimore" and "Norfolk", by counsel, filed before the State Corporation Commission of Virginia applications for review of the assessments of the State Taxes for the year 1950 based upon gross receipts from business transacted in the Commonwealth of Virginia for the year ending December 31, 1949, alleging, in substance, that the taxes in question were prohibited by the Commerce Clause of the Constitution of the United States since the steamships involved had been duly enrolled and licensed for employment in coasting trade under the authority of the Statutes of the United States and were thus immune from any other license tax for the exercise of the same privilege already granted by Congress.

The facts in these cases were stipulated by counsel and, since the questions of law were substantially the same in both of them, they were heard together on December 4, 1950, at which time one witness was introduced on behalf of the steamship companies and argument of counsel was heard.

On January 15, 1951, the majority of the State Corporation Commission, Commissioner Catterall dissenting, held that the assessment of the "annual license tax" against "Baltimore", in the amount of $19,015.51, was excessive, but that the said steamship company was subject to assessment for an "annual license tax" in the amount of $34.41, plus a penalty thereon of five per centum for failure to pay the tax within the time prescribed by law.

On January 16, 1951, the majority of the State Corporation Commission, Commissioner Catterall dissenting, held that the assessment of the "annual license tax" against "Norfolk", in the amount of $2,470.45 was excessive, but that the said steamship company was subject to assessment for an "annual license tax" in the amount of $104.86, plus a penalty thereon of five per centum for failure to pay the tax within the time prescribed by law.

Subsequently, the majority of the State Corporation Commission, in its opinions, explained the above mentioned orders by stating, in effect, that it was proper to assess a tax against the steamship companies based on their intrastate gross receipts, but for reasons set forth and discussed in the opinion printed only in Record No. 3888, in the Supreme Court of Appeals of Virginia at Richmond, *Commonwealth of Virginia* v. *Baltimore Steam Packet Company,* applicable to both of the cases under consideration here, that portion of the "annual license tax" based upon interstate gross receipts must be cancelled.

Counsel for the steamship companies urged that the tax based on any gross receipts was unconstitutional. The

Commonwealth of Virginia contended that the tax statute in question was not in conflict with the Commerce Clause of the Constitution of the United States and on May 11, 1951 the Supreme Court of Appeals of Virginia, upon petition of the Commonwealth, awarded an appeal as of right from the above mentioned orders of the State Corporation Commission.

On December 3, 1951, Buchanan, J., delivered the unanimous opinion of the Supreme Court of Appeals of Virginia reversing the orders of the State Corporation Commission. In so far as is pertinent for consideration of this Court, the State court held:

> 1. Section 58-575 of the Code of Virginia does not impose or lay any "duty of tonnage" in violation of the third clause of section 10, Article I of the Federal Constitution;
>
> 2. Section 58-575 does not require a "license" for the privilege of navigating in coastal waters; and
>
> 3. Section 58-575 imposes a property tax, fairly apportioned to the business done within the State, and thus does not impose an unconstitutional burden upon interstate commerce in violation of the Commerce Clause, Article I, Section 8, clause 3, of the Federal Constitution.

D. The Questions Presented

Do the assessments authorized by section 58-575 of the Code of Virginia violate in any way either the third clause of Section 10, Article I of the Constitution of the United States or the "Commerce Clause" of the said Constitution, namely, Article I, Section 8, Paragraph 3?

II

ARGUMENT

A. The Tax in Question Is Not a "Duty of Tonnage"

In this connection it is deemed sufficient only to quote from the opinion of the court below in which it was said:

> "We do not think the assessments violated in any way the third clause of section 10, Article I of the Constitution, providing that 'No State shall, without the Consent of Congress, lay any Duty of Tonnage'. That prohibition forbids a tax 'upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state', and applies to taxes and duties 'which operate to impose a charge for the privilege of entering, trading in, or lying in a port'. Clyde Mallory Lines v. Alabama, 296 U. S. 261, 56 S. Ct. 194, 196, 80 L. Ed. 215; 48 Am. Jur., Shipping, Section 651, p. 454. This is not that sort of tax." (193 Va. 55, 58; 68 S. E. (2d) 137, 140).

B. The Virginia Statute Does Not Require a License for the Privilege of Navigating in Coastal Waters

Apparently, the appellants' main contention is that since their vessels have been duly enrolled and licensed for employment in coasting trade under the authority of the Statutes of the United States, they are immune from any other license tax for the exercise of the same privilege already granted by Congress. The Commonwealth of Virginia does not dispute this principle and if the taxes in question were indeed license taxes for the privilege of employing vessels in the coasting trade, they would be invalid as a violation of the Commerce Clause of the Constitution.

However, the Commonwealth does not impose a license tax upon steamship companies as a condition to their right

to employ vessels in the coasting trade. The fact that the State Legislature saw fit to label the tax a "State license tax" is not material or controlling. It has long been established that courts are not concerned with the label used to describe a tax but are concerned only with the practical operation thereof. *Internatio[illegible] Pipe Line Co.* v. *Stone*, 337 U. S. 662, 666, and *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 292.

The Commonwealth imposes no license tax on the privilege of navigating. It does not refuse the right of passage through its territory [illegible] for any purpose or property; and it in no way interferes with the regulations and licenses imposed, and the privileges granted by Congress to the vessels of steamship companies. Therefore, such cases as *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Moran* v. *City of New Orleans*, 112 U. S. 69; and *Harman* v. *City of Chicago*, 147 U. S. 396, relied upon by counsel at the hearing below and before this Court, are not controlling, for this Court in those cases was considering taxes imposed as a prerequisite to the right to operate vessels on the navigable waters of the United States.

Section 58-575 of the Code of Virginia does not authorize the State Corporation Commission of Virginia to issue a "license" to vessels and it has never claimed such a right. The Commission has no power to enjoin the steamship companies from employing their vessels in the coasting trade for failure to pay the so-called "license tax", as was the case in *Moran* v. *City of New Orleans, supra,* and it is clear from both the majority and dissenting opinions handed down by the State Corporation Commission that it would not attempt to do so.

As Buchanan, J. ably said in rendering the opinion of the court below:

> "Certainly section 58-575 does not impose a license tax in the sense that its payment is a prerequisite to the

right to operate vessels in the navigable waters of the United States. It does not impose a tax on the privilege of navigation. The payment of the tax is not made a condition precedent to the right to carry on the business, as was the case in *Moran* v. *New Orleans*, 112 U. S. 69, 5 S. Ct. 38, 28 L. ed. 653, and *Harman* v. *Chicago*, 147 U. S. 396, 13 S. Ct. 306, 37 L. ed. 216. It provides no criminal sanctions, but its enforcement is left to the ordinary means devised for the collection of taxes. *Postal Tel. Cable Co.* v. *Adams, supra.* [155 U. S. 688, 695].

"Baltimore has been paying a tax on receipts from business 'beginning and ending in Virginia' every year since 1915, but no license has ever been issued to it and the procedures prescribed in Article I, Chapter 7 of Title 58 for obtaining licenses have not been followed. 'But where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax'. *Charlottesville* v. *Marks' Shows, supra*, 179 Va. at p. 329, 18 S. E. (2d) at p. 894." (193 Va. 55, 68-69, 68 S. E. (2d) 137, 146-147).

C. The Tax Involved in This Case Is a Property Tax Thus Making it Clear That No Substantial Federal Question Is Presented.

The appellants point to the recent decision of the Supreme Court of Appeals of West Virginia in the case of *American Barge Line Co.* v. *Koontz*, — W. Va. —, 68 S. E. (2d) 56 in an attempt to demonstrate the importance of the question here presented. However, they fail to point out in what ways that decision is the "reverse of the conclusion of the Supreme Court of Appeals of Virginia in the case at bar".

The case of *American Barge Line Co.* v. *Koontz, supra*, is not in conflict. The Supreme Court of Appeals of West Virginia expressly recognized the fact that water carriers operating under license of the Federal government may well be validly assessed with State taxes, and simply held that

(1) there was no taxable incident under the facts presented to afford a basis for the tax and (2) the tax imposed on the interstate business was a "privilege" tax.

The tax under consideration here is a property tax and the appellants are not alone when they pay to the locality taxes on tangible personal property and pay to the State taxes on intangible personal property and money as well as the taxes measured by gross receipts. See, Chapter 12, of Title 58 of the Code of Virginia, and especially, Article 2, Railway and Canal Companies, Article 4, Express Companies; Article 8, Telephone Companies; Article 10, Water or Heat, Light and Power Companies; and Article 14, Motor Vehicle Transportation Companies in Cities and Towns.

An examination of the Articles mentioned above clearly shows that the State Legislature has established a pattern for the taxation of certain public service corporations. The Legislature, in its wisdom, chose to label the tax on gross receipts a "State franchise tax" in some instances (see, Articles 2 and 10) and a "license tax" in other instances (see, Articles 4, 8 and 14), but regardless of the label the result is the same. Certain property, i. e., real estate and tangible personal property, has been segregated for local tax purposes and certain property, i. e., intangible personal property, money and the going concern value of real and tangible personal property based on gross receipts, has been set aside for State tax purposes.

As pointed out, section 58-575 is found in Article 7, Chapter 12 of Title 58 of the Code of Virginia and Chapter 12 is entitled, "Public Service Corporations". In the recent case of *City of Richmond* v. *Commonwealth*, 188 Va. 600, 50 S. E. (2d) 654, the court below in an exhaustive and able opinion by the late Mr. Justice Staples, considered the constitutional and statutory provisions which govern the assessment of the properties of public service corporations. Such a con-

sideration readily revealed that a uniform plan for the assessment and taxation of public service corporations had been evolved, and in this connection it was said:

> "• • • Since the existing method of assessing the properties of the appellee [power] company was developed from the system prescribed for assessing the properties of *railroad companies*, we will give our attention first to the origin and expansion of the constitutional and statutory provisions relating to the taxation of railroads." (188 Va. 613, 50 S. E. (2d) 660).

This system of taxation was placed in the Virginia Constitution of 1902 and the framers thereof, in order to make sure that the railroad tax did not violate the Federal Constitution, copied the Maine tax that had been upheld in the case of *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217. See, Constitutional Debates of Virginia, 1902, p. 2671. The tax was labeled a franchise tax, but the court below, speaking of a power company in the *City of Richmond* case, made it clear that the so-called franchise or license taxes levied on public service corporations were, in effect, property taxes.

It is clear, then, that there is no conflict in the decisions of the highest courts of Virginia and West Virginia. Furthermore, it is clear that the decision of the court below is not inconsistent with the decisions of this Court. See, *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653; *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80; *Ott* v. *Mississippi Val. Barge Line Co.*, 336 U. S. 169; and *Canton R. Co.* v. *Rogan*, 340 U. S. 511. Compare, *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, wherein a Connecticut statute was declared to be invalid because the taxpayer was engaged *exclusively* in interstate commerce and because the highest court of the State had determined that it imposed an "excise" tax.

III

Conclusion

Wherefore, the appellee respectfully submits this statement showing that the questions upon which the decision in these cases depends are so unsubstantial as not to need further argument, and the appellee respectfully moves the Court to dismiss these appeals or, in the alternative, to affirm the judgment entered in these cases by the Supreme Court of Appeals of Virginia.

Respectfully submitted,

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